QUESTIONS PRESENTED

1. Whether the court of appeals properly recognized the standing of the United States Senate and the leadership and Members of the House of Representatives to redress the nullification of their votes by Executive officials' failure to publish a law that Congress enacted and that became a law without the President's signature, pursuant to article I, section 7, clause 2 of the Constitution.

2. Whether the nullification of Congress' vote to enact this law continues to impose cognizable injury upon the Congress.

3. Whether the court of appeals correctly held that the President's failure to return a bill to the originating House, by delivering it to the officer appointed to accept veto messages during Congress's intersession adjournment, caused the bill to become a law, because the President was not constitutionally "prevented" from returning the bill, under article I, section 7, clause 2.

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In the Supreme Court of the United States

OCTOBER TERM 1985

No. 85–781

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF OF RESPONDENTS MICHAEL D. BARNES, ET AL., AND THE UNITED STATES SENATE

This case presents the question on the merits whether H.R. 4042, 98th Congress, has become a law. Congress enacted the bill and presented it to the President, but the President neither signed it nor returned it to the originating House of Congress with his objections. Representative Michael D. Barnes, et al., the Members of the United States House of Representatives who initiated this action, and the United States Senate, which intervened in the district court, submit this joint brief in support of the judgment of the court of appeals that H.R. 4042 became a law, because the President was not "prevented" from returning the bill within the meaning of Article I, section 7, of the Constitution.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that respondents have standing to sue. The cognizability of respondents' claim is established by *Coleman v. Miller,* 307 U.S. 433, 438 (1939), in which the Court conferred standing upon Kansas state legislators because of their "plain, direct and adequate interest in maintaining the effectiveness of their votes" to defeat Kansas's ratification of a constitutional amendment. Respondents likewise have standing because they, too, "have set up and claimed a right and privilege under the Constitution to have their votes given effect. . . ." *Ibid.*

Consistently with *Coleman* the Court has regularly recognized the standing of governmental officers to challenge infringements on their authority. In *United States v. Smith,* 286 U.S. 6 (1932), the Court adjudicated the Senate's claim that it had the constitutional right to reconsider its confirmation of a Presidential nominee. Indeed, as early as *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), the Court recognized the standing of a putative government official to vindicate, not pecuniary interests, but the right to exercise the authority of his office. Since *Marbury* the Court has recognized the standing of cabinet officers, *United States ex rel. Chapman v. Federal Power Commission,* 345 U.S. 153 (1953), former Presidents, *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), and states, *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), to redress injuries to their official authority.

The case-or-controversy requirement serves the separation of powers by minimizing conflicts between the judiciary and the elected Branches, avoiding interference with the political process, and restraining adjudication of questions that are "most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 475 (1982). Recognition of respondents' standing to vindicate their legislative role under the Constitution will strengthen, not erode, these separation-of-

powers principles. Contrary to petitioners' misapprehension, respondents do not challenge the Executive's execution of H.R. 4042, but seek only the performance of mandated ministerial duties that complete the lawmaking process.

The recognition of respondents' standing will reduce controversy between the Branches. "[T]he political branches [have] reach[ed] a constitutional impasse," *Goldwater v. Carter,* 444 U.S. 996, 997 (1979) (Powell, J., concurring), over a pure question of constitutional law, whose resolution is not subject to the political process. *INS v. Chadha,* 462 U.S. 919, 940–43, 957–59 (1983). Therefore, this case is unlike *Goldwater,* where it was uncertain "whether there ever will be an actual confrontation between the Legislative and Executive Branches," 444 U.S. at 998 (Powell, J., concurring), over the President's termination of the Taiwan treaty. Congress has completed legislative action sufficient to enact H.R. 4042 into law under the Constitution, but petitioners refuse to publish the law. Moreover, the Senate has "assert[ed] its constitutional authority" (*id.* at 997) by taking "official action" (*id.* at 998) to intervene in this action. In the case of such a "head-on confrontation[ ]," *United States v. Richardson,* 418 U.S. 166, 188 (1974) (Powell, J., concurring), respect for the courts and the vitality of the representative process will be enhanced by "this Court['s] . . . provid[ing] a resolution pursuant to our duty 'to say what the law is,' " *Goldwater,* 444 U.S. at 1001 (Powell, J., concurring) (quoting *United States v. Nixon,* 418 U.S. 683, 703 (1974)).

Because the legislative process to enact H.R. 4042 is complete, adjudication of respondents' complaint does not risk supplanting "the normal political process." *Id.* at 997. Rather, this suit seeks to vindicate the constitutionally mandated result of the representative process. Hence, it would be the denial of respondents' standing, rather than the adjudication of their action, that would frustrate the representative process and cause "a shift

away from a democratic form of government." *Richardson*, 418 U.S. at 188 (Powell, J., concurring).

II. This dispute remains a live controversy because petitioners' failure to publish H.R. 4042 continues to nullify respondents' votes. Because respondents are suing to obtain the publication of H.R. 4042, not to enforce its substantive requirements, the fact that those requirements apply to a past fiscal year is not germane to the vitality of their complaint. H.R. 4042's publication will redress respondents' live claim by effectuating their votes, irrespective of the law's substantive content. In addition, the prospective publication of H.R. 4042 continues to benefit respondents, because recognition of H.R. 4042's status as a law will require the Executive to comply with the government financial accountability statute, 31 U.S.C. § 1351 (1982), by reporting to Congress violations of H.R. 4042.

III. The court of appeals correctly held that H.R. 4042 became a law when the President failed to return the bill to the House within ten days although he was not prevented from doing so. The critical decision at the Constitutional Convention over the sharing of the lawmaking power was the Framers' determination to provide the President with only a qualified power to negative legislation, subject to Congress's override by two-thirds' vote. The Framers designed the pocket veto clause for the narrow purpose of protecting the President's opportunity to exercise his qualified power to return bills, by providing that if "Congress by their Adjournment prevent [a bill's] return, . . . it shall not be a Law." U.S. Const., art. I, sec. 7, cl. 2. This clause must be interpreted to further the limited purpose that it was designed to serve.

The President's ability to consider bills for ten days and the Congress's ability to enact bills over the President's objections are both safeguarded when the pocket veto is restricted to adjournments during which reconsideration is "prevented" because the originating House has not arranged for the acceptance of veto messages or the Congress has terminated. During a break such as the intersession adjournment of the Ninety-Eighth Congress, when both Houses had appointed officers to accept veto messages, the President is not "prevented" from returning a bill for Congress to reconsider. Adherence to the Framers' design precludes the President's exercise of an absolute pocket veto in such circumstances.

This Court's previous adjudications establish that the President improperly attempted to pocket veto H.R. 4042. In the *Pocket Veto Case*, 279 U.S. 655, 680 (1929), the Court held that "the determinative question in reference to an 'adjournment' " is not what type of adjournment it is, "but whether it is one that 'prevents' the President from returning the bill." Because at that time there was no practice of Congress's accepting Presidential messages through agents during adjournments, the Court found that, in order to eliminate potential delay and uncertainty, bills could be returned only while the originating House was in session. *Id.* at 682–85. Nine years later, in *Wright v. United States*, 302 U.S. 583 (1938), the Court ruled that the President could return vetoes by delivering them to congressional agents during adjournments. The Court held that whether Congress had prevented the President from returning a bill during an adjournment depended upon "the manifest realities of the situation." *Id.* at 595. The Court approved the President's return of a bill to the Secretary of the Senate while the Senate was in recess, because it found that there was no "practical difficulty in making the return of the bill during the recess," *id.* at 589, and that during such a break its earlier concerns over delay and uncertainty were "wholly chimerical," *id.* at 595.

The "manifest realities" of Congress's modern adjournments similarly demonstrate that Congress's designation of agents to accept veto messages has eliminated all serious risk of uncertainty or undue delay. Well-established practices ensure the prompt, certain, and public recording of the fact and exact time of bills' return to Congress during adjournments. Because the Congress did not pre-

vent the return of H.R. 4042, the court of appeals correctly held that it became law.

ARGUMENT

I. RESPONDENTS HAVE STANDING TO REDRESS PETITIONERS' NULLIFICATION OF THEIR VOTES

Recognition of the standing of legislators to sue to protect the effectiveness of their votes is consistent with the Court's teaching that the standing element of the "case or controversy" requirement preserves the separation of governmental powers. Petitioners incorrectly posit that under the separation powers a governmental entity or officer can never have standing to invoke judicial redress for a legal injury to its or his governmental power. This conclusion is rebutted by a wealth of cases in which the Court has adjudicated legal disputes over the allocation of governmental power at the instance of an injured governmental entity. Instead of the arbitrary and inflexible prohibitory rule proffered by the petitioners, the Court has adopted a more reasoned approach that confers standing when doing so will serve, rather than impair, the separation of powers.

Application of this traditional approach compels the court of appeals' conclusion that adjudicating respondents' complaints fulfills the separation-of-powers principles underlying the standing requirement. Respondents have sued to redress an impairment of their constitutionally assigned legislative role under the separation of powers. Because respondents took all actions that were available to them within their legislative role before they filed this action, they are not seeking a remedy from the Court to supplant or otherwise interfere with the legislative process. Rather, they have brought to the judiciary a mature legal controversy whose resolution lies squarely within the Court's competence and traditional role. By adjudicating the dispute the Court does not risk acting outside its properly limited role or usurping the domain of the representative Branches. To the contrary, where,

as here, one of the political Branches has impaired the textual constitutional authority of its coordinate Branch, and the injured Branch has taken all possible action within its sphere to protect its role, the injured Branch's invocation of the judicial power to remedy the constitutional injury is a safe, proper, and necessary means of assuring the maintenance of the balance of separated powers among the Branches.

A. The Nullification of Legislators' Votes Inflicts Upon Them a Concrete, Cognizable Injury

Under the "case or controversy" requirement of Article III, the judicial power may be exercised only at the instance of a plaintiff who "allege[s] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). To have Article III standing, a plaintiff must have sustained a " 'distinct and palpable injury,' " *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), "to a concrete, personal interest," *Allen v. Wright*, 468 U.S. at 756.

The Court has firmly established that legislators have a "plain, direct and adequate interest in maintaining the effectiveness of their votes" to provide them with standing to remedy an impairment of their votes. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). In so doing, the Court relied principally on its earlier determinations that individual voters have a cognizable interest in maintaining the efficacy of their votes. *Id.* at 438–41 (discussing *Hawke v. Smith (No. 1)*, 253 U.S. 221 (1920); *Leser v. Garnett*, 258 U.S. 130 (1922)). Since *Coleman* the Court has consistently reaffirmed the cognizability of injuries to the interests of voters. *See Baker v. Carr*, 369 U.S. 186, 206–08 (1962), and cases cited therein. In *Baker* the Court concluded that its intervening "decisions plainly support" (*id.* at 206) the conferral of standing on voters, who "seek relief in order to protect or vindicate an interest of their own," *id.* at 207. The Court has thus firmly established

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the judicial cognizability of "a concrete injury to fundamental voting rights." *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 223 n.13 (1974).

The respondents' status as legislators does not diminish their standing to redress the nullification of their votes. In *Coleman* the Court viewed as legally indistinguishable the standing of legislators and of voters to sue to remedy impairment of the efficacy of their votes. The Court described its individual-voter cases as "controlling authorities" for the recognition of legislator-voter standing. 307 U.S. at 441. To the extent that the Court saw fit to differentiate at all between the two types of plaintiffs, it found that the interests of individuals, who were "merely qualified voters," were "certainly much less impressive" than the interests of legislators, who "were not only qualified to vote . . . but [whose] votes . . . would have been decisive." *Ibid.* Consistent with this view, Justice Stevens, while serving on the Seventh Circuit and sitting on a three-judge district court, interpreted *Coleman* and *Baker* as establishing the standing of legislators to sue in federal court to protect the efficacy of their votes. *Dyer v. Blair,* 390 F. Supp. 1291, 1297 n.12 (N.D. Ill. 1975) (three-judge court). There is no principled distinction between *Coleman*, a suit by state legislators to vindicate their votes, which were sufficient to prevent their state's ratification of a constitutional amendment, and this action by federal legislators to vindicate their votes, which were sufficient to enact a federal law.[1]

[1] Justice Stevens' reliance on *Coleman* to establish legislators' standing in *Dyer* refutes petitioners' contention, Brief for the Petitioners ("Pet. Br.") 23 n.16, that in *Coleman* the Court held that the legislators had standing only because the state court whose decision the Court was reviewing had granted them standing. If petitioners were correct that *"Coleman* does not stand for the broad proposition that *all* legislators have standing to bring an action in *federal* court on the basis of an asserted injury to their lawmaking functions," *ibid.*, then *Coleman* would have provided no authority for Justice Stevens' decision in *Dyer*, because *Dyer* was brought in federal court to redress an

Continued

Included in respondents' right to vote is the right "to have their votes counted." *United States v. Classic,* 313 U.S. 299, 325 (1941). The respondent Members of Congress alleged in their complaint that unlawful actions of the defendants "have nullified [their] votes in favor of the bill." J.A. 27.[2] The respondent Senate alleged that "constitutional and statutory violations of defendants have deprived the intervenor United States Senate of its constitutional role in the enactment of legislation and have nullified the votes of members of the United States Senate for the passage of H.R. 4042." J.A. 58; *accord* J.A. 90 (House complaint). Thus, respondents "have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect," *Coleman,* 307 U.S. at 438, and they have standing to redress this "concrete injury to fundamental voting rights," *Schlesinger,* 418 U.S. at 223 n.13.

B. Redress of the Nullification of Legislators' Votes Is Consistent With the Court's Adjudication of Constitutional Claims of Governmental Litigants

There can be no question that "[t]he idea of separation of powers . . . underlies standing doctrine." *Allen v. Wright,* 468 U.S. at 759. As the court of appeals and all

asserted injury to legislators' lawmaking functions. The court of appeals correctly rejected petitioners' narrow interpretation of *Coleman*. *See* Pet. App. 15a n.15; *cf. Phillipe Petroleum Co. v. Shutts,* 105 S.Ct. 2965, 2971 (1985) (standing in federal court does not depend on state court standing).

The court of appeals also properly rejected petitioners' attempt, Pet. Br. 23 n.16, to distinguish *Coleman* on the ground that it was brought by state, not federal, legislators. The court noted the inconsistency of such a distinction in light of "the Court's emphasis [in *Coleman*] of 'the legitimate interest of public officials and administrative commissions, *federal and state*, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties.' " Pet. App. 15a–16a n.15 (quoting 307 U.S. at 442) (emphasis added).

[2] Among the original thirty-three Member plaintiffs, Richard L. Ottinger has retired from the House of Representatives and Paul Simon has been elected to the Senate.

parties recognize, the standing principle "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. at 498. It fulfills "Art. III['s] limit [of] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Chris-tian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

From this unassailable fact, however, petitioners draw a sweeping and unsound conclusion. "There is," they maintain, "an irreconcilable conflict between the principles of separated powers that Article III embodies and a case, such as this one, in which a court is asked to referee an intragovernmental dispute between the political Branches, and to do so in the absence of any claim by a private party that he has been injured or that he stands to benefit as a result of the court's decision." Pet. Br. 15–16 (emphasis omitted).[3] This view parallels the dissent's contention below that Article III never permits an injured governmental entity, in distinction to "a private party alleging a concrete injury," to "protect [its] governmental powers" through the courts. Pet. App. 48a.

Although such a doctrine would have the virtue of simplicity, it is not and has never been the law. Instead, the Court's standing jurisprudence has followed its admonition that "[t]he versatility of circumstances often mocks a natural desire for definitiveness." *Wiener v. United States*, 357 U.S. 349, 352 (1958). The Court has adopted a far more sophisticated and flexible approach in determin-

[3] Petitioners challenged respondents' standing in this case for the first time in their petition to the court of appeals for rehearing. Prior to that filing, petitioners had conceded that the Senate has standing because it "is alleging injury to its corporate interests, that is its interests as a body in being able to consider legislation." Transcript of Appellees' Oral Argument, *Barnes v. Kline*, June 4, 1984, at 12 (filed Dec. 30, 1985 and Jan. 15, 1986, *see* J.A. 4).

ing when governmental entities have presented a "case" or "controversy," reflecting the Court's understanding that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*, 392 U.S. at 94.

This Court has adjudicated an earlier action initiated at the behest of the United States Senate to resolve a dispute with the Executive Branch over the constitutional allocation of authority between the Branches. In *United States v. Smith*, 286 U.S. 6 (1932), the Senate challenged the right of a nominee to the Federal Power Commission to hold office. After the Senate had confirmed the nomination and notified the President of the confirmation, the Senate moved to reconsider its action pursuant to its rules and requested the President to return the resolution of confirmation. When the President refused to do so, the Senate defeated the nomination upon reconsideration and requested initiation of a *quo warranto* proceeding in the name of the United States "in deference to the desire of the United States Senate to have presented for judicial decision the question whether [the nominee] holds lawfully the office." *Id.* at 26. The Executive consented to institute the proceeding, on the condition that the Senate employ its own counsel, and the Executive appeared as amicus curiae to defend the validity of the appointment. *Id.* at 30. Thus, although the United States was the nominal petitioner, the challenge was in reality brought by the Senate and defended by the Executive and the putative officer. As in this action, all parties to the proceeding were governmental, and only the Legislative Branch was seeking relief.[4] Notwithstanding the case's unusual align-

[4] The United States' nominal status as the petitioner does not meaningfully distinguish *Smith* from this action, because the Court "look[s] behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *United States v. ICC*, 337 U.S. 426, 430 (1949).

ment, the Court adjudicated the merits of the Senate's constitutional challenge.

The Court has similarly recognized the standing of governmental officers to challenge infringements to their constitutional authority from its initial enunciation of "the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* was an action by a putative government official for the delivery of the commission necessary to furnish him with evidence of his constitutional authority to exercise governmental power. As the Court recognized, Marbury was suing to obtain "the office itself. . . . He will obtain the office by obtaining the commission." *Id.* at 173. Thus, like this action, Marbury's suit was an effort to vindicate his right to exercise governmental authority.[5]

Indeed, the parallel between this action and Marbury's suit is even stronger. Marbury asserted that under the Constitution he had been appointed a justice of the peace for the District of Columbia. He claimed that the Secretary of State had failed to deliver his judicial commission, a ministerial duty necessary to provide him with public evidence of the completion of his appointment and, consequently, of his authority to perform the duties of the office. Similarly, respondents here assert that, under the Constitution, they have enacted H.R. 4042 into law, and that the petitioners have failed to perform the ministerial duties necessary to furnish public evidence of their enactment.[6] Thus, both *Marbury* and this action were brought by governmental officers alleging that other officers' failure to perform statutorily mandated acts had deprived them of their constitutionally assigned authority.

Since *Marbury* the Court has adjudicated a number of actions by governmental officers to establish their entitlement to exercise governmental power. In *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953), the Court faced "a conflict of view between two agencies of the Government having duties in relation to the development of national water resources." *Id.* at 155. The action was brought by the Secretary of the Interior and a nonprofit association to challenge the Federal Power Commission's grant of a license to construct a power-generating station. The court of appeals had held that the Secretary lacked standing because he could not "point to some special interest for which he is charged with responsibility that may be adversely affected by the action attacked." 191 F.2d 796, 800 (4th Cir. 1951). In the Supreme Court the Secretary based his claim of standing on the "specific interest" generated by his statutorily vested duties. 345 U.S. at 156. The Court, per Justice Frankfurter, held that the Secretary had standing based on this showing and reached the merits of his claim. *Ibid.*[7]

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[5] Petitioners argue that Marbury was alleging "an injury-in-fact to him in his private capacity." Pet. Br. 20 n.14. Analogizing Marbury's suit to *Powell v. McCormack*, 395 U.S. 486 (1969), petitioners state that "[t]his case, however, concerns not a private entitlement to office, but the boundaries of the powers of such an office, presented wholly apart from any private injury." Pet. Br. 20 n.14. Petitioners' identification of *Marbury* with *Powell* as a basis for standing is not apt. In *Powell* the basis for adjudicating Representative Powell's claim that he had been unconstitutionally excluded from office, *after* he had been seated following another election, rested on his "obvious and continuing interest in his withheld salary." 395 U.S. at 497. In contrast, the Court had made clear in *Marbury* that Marbury was not seeking a money judgment for his salary, but rather his commission, to vindicate his right to exercise the powers of his office. 5 U.S. (1 Cranch) at 173 ("The value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.").

[6] The statute on which Marbury relied is the precise forerunner of the statutes underlying respondents' action. *See* Act of September 15, 1789, § 4, 1 Stat. 68.

[7] The Court did not set forth its reasoning because of its view that "[i]t would not further clarification of this complicated specialty of federal jurisdiction . . . to set out the divergent grounds [within the Court] in support of standing in these cases." *Ibid.* However, it is incontestable that the Secretary was granted standing to litigate "the boundaries of the powers of [his] office." Pet. Br. 20 n.14.

In other circumstances the Court has similarly adjudicated claims of governmental power brought by governmental officers. For example, in *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), the Court recognized the right of a President to challenge a statute as an unconstitutional infringement on Presidential privilege. The Court adjudicated former President Nixon's claim of privilege while recognizing "that the privilege 'belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party.' " *Id.* at 448 (quoting *United States v. Reynolds,* 345 U.S. 1, 7–8 (1953)); *accord id.* at 502 (opinion of Powell, J.). The Court further held that President Nixon had standing to litigate his claim that the challenged statute violated the constitutional separation of powers. *Id.* at 439. Thus, with regard to both the Presidential privilege and the separation of powers claims, the Court conferred standing on President Nixon, in his capacity as the former President, to sue Executive Branch officials to assert claims of infringement on his governmental power.

The Court's recognition of the standing of governmental entities to adjudicate claims of infringement on their authority is equally evident in litigation involving allegations of infringement on the powers of states. For example, in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), the State of South Carolina challenged the constitutionality of the Voting Rights Act of 1965. While holding that South Carolina lacked standing to raise some claims, the Court permitted South Carolina to challenge the Act's constitutionality "[a]s against the reserved powers of the States." *Id.* at 324.[8]

[8] *Katzenbach* is only one of a number of cases in which the Court has granted a state standing to litigate an asserted infringement on its "alleged quasi sovereign rights." *Missouri v. Holland,* 252 U.S. 416, 431 (1920). In *Coleman* the Court noted that in numerous cases it had conferred standing on state officials in recognition "that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question." Continued

C. The Recognition of Standing to Redress the Nullification of Legislators' Votes Serves the Separation of Powers

As petitioners correctly urge, separation-of-powers principles must inform the analysis of respondents' standing. However, contrary to petitioners' approach, it is an examination of the *purposes* served by the separation of powers doctrine, rather than the mere incantation of the doctrine, that illuminates the standing question in this case. Separation-of-powers analysis requires "courts [to] look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *United States v. Interstate Commerce Commission,* 337 U.S. 426, 430 (1949).

1. The Court Has Identified Three Principles Reflecting the Separation-of-Powers Concerns Implicated in Standing Analysis

The Court has identified three central separation-of-powers principles that standing analysis must reflect. First, in order to ensure "the continued effectiveness of the federal courts," *Valley Forge,* 454 U.S. at 473, the Court strives to avoid " '[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government[, which] will not, in the long run, be beneficial to either,' " *id.* at 474 (quoting *United States v. Richardson,* 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Second, in order to avoid interfering with the functioning of "the normal political process," the Court refrains from intervening in disputes between the Branches that "turn on political rather than

307 U.S. at 445; *see id.* at 442–44 (citing cases). In *Coleman* the Court rejected the claim renewed in the dissent below, Pet. App. 63a n.6, that states do not have standing to allege "an injury to governmental powers," but only to challenge a "require[ment] by federal statute to expend money." Summarizing the instances in which it had granted standing to state officials, the Court concluded that "[i]n none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any 'private damage.' " 307 U.S. at 445.

legal considerations." *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

Third, perhaps the most important separation-of-powers basis for judicial restraint rests on the relation between "the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Richardson*, 418 U.S. at 192 (Powell, J., concurring). "[M]indful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch," *id.* at 188, the Court has maintained its "properly limited . . . role . . . in a democratic society," *Warth v. Seldin*, 422 U.S. at 498, by refraining from adjudicating questions that are "most appropriately addressed in the representative branches," *Valley Forge*, 454 U.S. at 475.

Where these principles apply, they provide compelling grounds for the Court to avoid adjudicating disputes. The proper separation of governmental powers is not strengthened, however, by the hollow invocation of the separation-of-powers doctrine in a case such as this one, in which none of these restraining factors is present. To the contrary, "[p]roper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch [not] shrink from a [justiciable] confrontation with the other two coequal branches of the Federal Government," just as strongly as it precludes the courts from "hospitably accept[ing] for adjudication claims of constitutional violation by other branches" that present no case or controversy. *Id.* at 474.

2. Recognizing Respondents' Standing to Vindicate Their Votes to Enact Legislation Furthers These Vital Separation-of-Powers Concerns

By filing this action to secure a declaration of the effectiveness of their votes to enact a bill into law, respondents are suing to vindicate the legislative role assigned to them by the Constitution. Because respondents have invoked the courts' jurisdiction to remedy an injury to the completed performance of their legislative role, the adjudication of their complaint will strengthen, not erode, the separation-of-powers principles underlying the case-or-controversy requirement.

a. Respondents Are Suing to Vindicate Their Power to Enact Laws, Not to Enforce Laws

The single goal of respondents' suit is to obtain relief from the petitioners' nullification of their votes to enact H.R. 4042 into law. Contrary to petitioners' persistent misunderstanding, respondents have asserted no right "to challenge the manner in which Executive Branch officials execute the law," Pet. Br. 13, but solely to challenge the acts of omission through which Executive officials nullified respondents' votes to enact a law.[9] The foundation for petitioners' mischaracterization of this action as "equivalent to one expressly challenging the President's execution of the laws," *id.* at 25, is their belief that once Congress has presented a bill to the President, the legislative process is complete and the bill "has passed out of the domain of the Legislative Branch," *id.* at 22. In petitioners' view, after presentation "Members of Congress do not have any continuing, quasi-proprietary stake in a bill," and "[a]t that point, any official relation of the Federal Government to the measure devolves upon the other two Branches." *Ibid.*

Contrary to petitioners' understanding of the demarcation between the legislative and the executive processes,

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[9] Petitioners contend that respondents' suit

> is nothing more than a claim that the President has failed to execute the law. The individual respondents do not and could not claim that they were denied an opportunity to vote in Congress. Their votes were fully counted and, indeed, were fully effective in securing the passage of H.R. 4042 and its presentment to the President. Thus, respondents' argument can only be that their votes have been "nullified" because the President did not adhere to the requirements of H.R. 4042 after it passed both Houses.

Id. at 21.

however, the legislative process is not complete when Congress presents a bill to the President. It continues to run under the Constitution until there has been a final determination whether a bill "shall become a Law" or "shall not be a Law." U.S. Const., art. I, sec. 7, cl. 2. Whether the President chooses to sign a bill, to return it to Congress for reconsideration, to pocket veto it, or to allow it to become a law without his signature, he is exercising a legislative, not an executive, function. As the Court has noted, the provisions of Article I, section 7 "prescribe and define the respective functions of the Congress and of the Executive in the *legislative* process." *INS v. Chadha*, 462 U.S. 919, 945 (1983) (emphasis added). The qualified veto power defines the President's "role in the lawmaking process." *Id.* at 947.[10]

Correction of petitioners' misperception of the extent of the legislative process exposes the fallacy in their argument. Petitioners state, "[Congress's] role in the legislative process as regards H.R. 4042, which extended only to the presentment of the bill to the President, remains fully effective and effectuated, because any failure of H.R. 4042 to become a law is attributable to circumstances occurring after presentment." Pet. Br. 26. However, because the legislative process extends beyond presentment until the bill's status is final, the fact that petitioners' failure to treat H.R. 4042 as a law occurred after presentment is irrelevant to respondents' claim. Petitioners' failure to publish H.R. 4042 as a law prevented Congress's vote from being "effective and effectuated" by unconstitutionally short-circuiting the legislative process. Thus, respondents' claim presents purely a controversy about

[10] *Accord id.* at 945, 947, 948, 951 (describing veto as "legislative" or "lawmaking"); *Edwards v. United States*, 286 U.S. 482, 490 (1932) ("The President acts legislatively under the Constitution. . . ."); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 453 (1899) ("Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws. . . .").

the Article I legislative process and the efficacy of respondents' role in that process.[11]

Petitioners maintain alternatively that the Court's decision in *INS v. Chadha* precludes respondents from litigating the lawfulness of petitioners' nullification of their votes to enact H.R. 4042. They state, "Just as Congress cannot overrule Executive action directly by means of a legislative veto, Congress cannot accomplish the same result indirectly by invoking the assistance of the federal courts. . . ." Pet. Br. 18. Petitioners do not explain the basis for their contention that respondents' vindication, through the judicial process, of their votes to enact H.R. 4042 into law would give Congress " 'an overruling influence over the other[ ] [branches] in the administration of their respective duties.' " *Id.* at 18 (quoting *The Federalist* No. 48). Respondents seek only to preserve their legislative role from the President's attempt to use the pocket veto power to prevent Congress from overriding his vetoes. As long as Congress is operating within its assigned legislative sphere, the courts have recognized Congress's right, acting outside the constraints of bicameral action and presentation, to invoke the jurisdiction of the federal courts by instituting civil actions when necessary to effectuate its performance of its legislative functions.[12]

[11] The President's performance of his Article II duty to execute the laws is simply not involved in this lawsuit. H.R. 4042 imposed particular reporting duties upon the President, Pet. App. 142a–145a, but respondents have not sued the President, because they are not seeking to force the President to perform any duties. Instead, respondents sued the two Executive officials who have the responsibility to complete the lawmaking process by causing enacted laws to be published. It is these officials who have injured respondents by nullifying their votes to enact H.R. 4042. *See* pages 28–32 *infra*.

[12] *See, e.g., In re Application of the United States Senate Permanent Subcommittee on Investigations (Cammisano)*, 655 F.2d 1232 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981) (initiation of action by congressional committee for enforcement of subpoena through civil contempt power); *United States v. American Telephone and Telegraph Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (a House of Congress "has standing to assert its

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b. Recognizing Respondents' Standing to Redress the Nullification of Congress's Lawmaking Power Serves the Separation-of-Powers Principles Identified by the Court

Recognition of respondents' standing is fully consistent with the separation-of-powers principles that underlie the Court's standing doctrine. Because the Branches have reached constitutional impasse on a question that requires legal and not political resolution, adjudication of this dispute will neither generate unnecessary confrontation between the Branches nor interfere with the political process. Indeed, resolution of respondents' claim will preserve the separation of powers, by safeguarding the constitutional process for lawmaking.

First, this is not a case in which "we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches." *Goldwater v. Carter,* 444 U.S. at 998 (Powell, J., concurring). To the contrary, "the political branches [have] reach[ed] a constitutional impasse." *Id.* at 997. The Congress completed bicameral action on H.R. 4042 and sent it to the President for his approval or veto. Although the President failed to return the bill to Congress with his objections, the President's subordinates, acting under his instructions, have refused to publish the bill as a law.

By passing and presenting H.R. 4042, which is all that Congress can do, and indeed all that it is required to do under the Constitution, to enact a law, Congress took the

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investigatory power" by appealing from issuance of injunction against complying with subpoena); *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725 (D.C. Cir. 1974) (en banc) (dismissing on merits suit brought by congressional committee for enforcement of subpoena).

It is petitioners' position that the only manner in which respondents can vindicate their votes to enact H.R. 4042 into law is to pass a new law. Pet. Br. 18. They do not explain how Congress's exercise of its authority to pass a new bill, which would be equally subject as H.R. 4042 to the petitioners' potential refusal to publish it as a law, would redress respondents' injuries.

"official action," *id.* at 998, that assures "an actual confrontation between the Legislative and Executive Branches," *ibid.* It is beyond contention that "the normal political process has [no] opportunity to resolve the conflict" over the President's exercise of a pocket veto. *Id.* at 997. The individual respondents accordingly sued to obtain a declaration that petitioners' actions unlawfully nullified their votes.

The existence of "a constitutional impasse" between the political Branches, *ibid.,* is further demonstrated by the Senate's "asserti[on of] its constitutional authority," *ibid.,* by the adoption of Senate Resolution 313, 98th Congress, directing its Legal Counsel to intervene in this action in order to "protect[ ] the constitutional authority of the Congress to enact laws over the objections of the President." 130 Cong. Rec. S224 (daily ed. Jan. 26, 1984) (Sen. Baker).[13] Congress's constitutionally sufficient vote

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[13] The Senate determined to seek relief in this action under its statutory authority to intervene in "any legal action . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." 2 U.S.C. § 288e(a) (1982). Of course, the Senate's intervention requires Article III standing. *See id.* (authorizing intervention "only if standing to intervene exists under section 2 of article III"). However, the intervention statute serves to "expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' " *Gladstone,* 441 U.S. at 100 (quoting *Warth,* 422 U.S. at 501); *accord Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 212 (1972) (White, J., concurring).

In the court of appeals, both the majority and the dissent viewed the constitutional issues of the Senate's standing and that of individual legislators as identical. Pet. App. 15a, 17a & n.16, 49a n.1. The Court need not reach the question whether the individual legislators would have had standing without the presence of their "collegial bodies," *Bender v. Williamsport Area School District,* No. 84-773, slip op. at 9-10 (Mar. 25, 1986), because the Senate is a party. *See Bowsher v. Synar,* No. 85-1377, slip op. at 5 (July 7, 1986). It is irrelevant that individual legislators initiated this action and that the Senate intervened. The identical situation existed in *Bowsher,* in which the only appellee who the Court held had standing not only was an intervenor, but had in-

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to enact H.R. 4042 and the Senate's formal intervention resolution both constitute "appropriate formal action," *Goldwater,* 444 U.S. at 1002 (Powell, J., concurring), manifesting that "the President and the Congress ha[ve] reached irreconcilable positions," *id.* at 1001.[14]

Where such a "head-on confrontation[ ]," *Richardson,* 418 U.S. at 188 (Powell, J., concurring), between the political Branches has occurred, neither the "public confidence essential" to the courts, nor the "vitality critical" to the political Branches, *ibid.,* would be enhanced by a judicial refusal to adjudicate the dispute and redress the constitutional injury. To the contrary, "shrink[ing]" from the Court's "duty . . . to give full effect to the provisions of the Constitution relating to the enactment of laws," *Chadha,* 462 U.S. at 943 (quoting *Field v. Clark,* 143 U.S. 649, 670 (1892)), by permitting the abrogation of the constitutional design, would erode public confidence and undermine the vitality of the representative system. As the

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tervened initially in the Supreme Court. *Bowsher,* slip op. at 5; 106 S.Ct. 1488 (1986) (granting motion for leave to add party plaintiff). Although the Senate currently provides a mechanism only for intervening in previously filed court actions, this intervention statute would not bar the Senate from resolving to initiate an action to protect its legislative interests. *See, e.g.,* S. Res. 415, 73d Cong., 3d Sess. (1931) (authorizing initiation of civil action in name of Senate if Executive declined to initiate *quo warranto* proceeding to test Senate's power to reconsider confirmation of Presidential nominee, *see* p. 11 *supra*).

[14] The individual plaintiffs and the Senate were joined by the Speaker and Bipartisan Leadership Group of the United States House of Representatives, who intervened to represent the House's interests. J.A. 85–86. This House group recently represented the House's interests in "defend[ing] the validity of a statute," *Chadha,* 462 U.S. at 940, in this Court in *O'Neill v. Synar,* No. 85–1379 (July 7, 1986), which the Court decided along with its companion cases, *Bowsher v. Synar* and *United States Senate v. Synar.* Contrary to petitioners' suggestion, Pet. Br. 27 n.20, even without the House parties' intervention, the Senate would have had standing to protect its constitutional interests alone, just as a majority of the members of one house of a bicameral state legislature, *see Coleman,* 307 U.S. 433, and a head of an executive department, *see Chapman,* 345 U.S. 153, have standing to vindicate their authority.

Court has observed, "[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959. Where "the President and the Congress ha[ve] reached irreconcilable positions," as in this case, "[t]he specter of the Federal Government brought to a halt because of the[ir] mutual intransigence . . . require[s] this Court to provide a resolution pursuant to our duty 'to say what the law is.' " *Goldwater,* 444 U.S. at 1001 (Powell, J., concurring) (quoting *United States v. Nixon,* 418 U.S. 683, 703 (1974)). The court of appeals soundly concluded that, "[b]y defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers." Pet. App. 18a.

The second factor demonstrating that a grant of standing to respondents is consistent with the separation of powers is that both the Congress and the President have taken all legislative actions that they ever will take on H.R. 4042. Adjudication does not risk interfering with or supplanting the political process, because respondents do not "seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." *Goldwater,* 444 U.S. at 997 (Powell, J., concurring). Petitioners are simply wrong when they assert that recognition of respondents' standing "would allow . . . Members of Congress to circumvent the 'intensely practical' process of 'compromise and accommodation' that is essential to the day-to-day 'business of government.' " Pet. Br. 24 (quoting Pet. App. 78a (Bork, J., dissenting)).[15]

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[15] As the court of appeals explained, this suit is wholly unlike numerous cases in which "a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process." Pet. App. 13a–14a (citing cases). In contrast, in this case "[t]he court is not being asked to provide relief to legislators who failed to gain their ends in the legisla-

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As this Court has made clear, the Constitution's "single, finely wrought . . . procedure" for lawmaking, *Chadha,* 462 U.S. at 951, is not open to compromise or accommodation. *Id.*, at 940–43, 957–59. Respondents, moreover, did not sue to "circumvent" the political process. To the contrary, the political process has been completed, and respondents have sued only to vindicate the result of that process. The constitutional question whether H.R. 4042 has become a law does not "turn on political rather than legal considerations." *Goldwater,* 444 U.S. at 997 (Powell, J., concurring). Therefore, the Court's "deci[sion] whether one branch of our Government has impinged upon the power of another," *id.* at 1001, presents no threat of an intrusion into the political process.[16]

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tive arena. Rather, the legislators' dispute is solely with the executive branch." *Id.* at 15a.

Petitioners themselves previously understood,

> This is not a dispute among members of Congress in which they have come to the Court to settle for them. . . . And in that sense it is different from Goldwater v. Carter and different from many of the congressional standing cases we have where individual Congressmen failed to persuade their brethren to adopt their point of view and asked the courts to do their dirty work for them. Here we have an institution, the Senate, by resolution and statutory authority appearing, and we think that is distinguishable under these circumstances.

Transcript of Appellees' Oral Argument, *Barnes v. Kline,* June 4, 1984, at 14 (filed Dec. 30, 1985 and Jan. 15, 1986, *see* J.A. 4); *accord Coleman,* 307 U.S. at 441 ("This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution. . . .").

[16] The prerequisite that a Branch take official action within its sphere before initiating legal action to protect its role may have different applications in different settings. Because the Legislative Branch acts in a legislative capacity, Congress's enactment of legislation completes the possible action within its assigned sphere. In contrast, because the Executive Branch acts to execute the laws, it may take executive action to protect its constitutional prerogatives before seeking assistance from the courts. *See, e.g., Humphrey's Executor v. United States,* 295 U.S. 602 (1935) (President's removal of independent officer notwithstanding statutory prohibition precipitated adjudication of President's constitutional removal power).

Finally, recognition of respondents' standing to vindicate the nullification of their votes to enact H.R. 4042 does not expand the role of the courts beyond their proper limits in our representative democracy. To the contrary, respect for the separation of powers mandates the adjudication of respondents' complaint, because to "maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." *Chadha,* 462 U.S. at 958. Respondents sued to redress the nullification of their role under the "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Id.* at 945. The preclusion of a judicial resolution of this controversy out of respect for the limited role of the courts vis-a-vis the political Branches would stand the separation of powers doctrine squarely on its head. *Cf. Chadha v. INS,* 634 F.2d 408, 419 (9th Cir. 1980), *aff'd,* 462 U.S. 919 (1983).

When the courts are asked to resolve questions that the Framers reserved for political deliberation, the assumption of jurisdiction improperly would "shift away from a democratic form of government." *Richardson,* 418 U.S. at 188 (Powell, J., concurring). This case, however, like *Chadha,* presents a purely *legal* question about the constitutionally mandated *procedures* for political deliberation. Respondents seek to vindicate the constitutional process by which elected representatives act to fulfill the will of the electorate. It is one thing for the courts to decline to adjudicate grievances that are "most appropriately addressed in the representative branches." *Valley Forge,* 454 U.S. at 475. It would be another thing altogether for the courts, in the name of the primacy of the representative process, to refuse to adjudicate this controversy, which seeks solely to vindicate the result produced by the representative process. In this case it would be the refusal to adjudicate respondents' complaint, not the recognition of their standing, that would bring "a shift away from a democratic form of government."

"Our system of government leaves many crucial decisions to the political processes." *Schlesinger,* 418 U.S. at 227. For example, the substantive question governed by H.R. 4042—whether, as a matter of policy, the United States government should provide assistance to another nation's government, and, if so, under what conditions—is an issue whose resolution is committed exclusively to the political Branches. However, once the political processes have produced a decision on this question, the courts' fulfillment of their duty "to say what the law is," *Marbury,* 5 U.S. (1 Cranch) at 177, does not intrude into the political process. Rather, in this context the judiciary's performance of its adjudicatory function strengthens the democratic process by securing adherence to constitutional processes and mandating the legislative results that were produced by the representative Branches under the Constitution.[17]

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[17] Petitioners claim that the maintenance of this suit "resembles the proposal, rejected by the Constitutional Convention, for joining members of the Judiciary in a council of revision to review all bills passed by the National Legislature." Pet. Br. 16 n.10. The two have transparently nothing in common. Respondents do not seek judicial participation in the decision over the wisdom or desirability of enacting H.R. 4042, which under our system is committed exclusively to the political Branches. Instead, they seek "no more than an interpretation of the Constitution, . . . [which] falls within the traditional role accorded courts to interpret the law." *Powell v. McCormack,* 395 U.S. 486, 548 (1969). Indeed, Elbridge Gerry, the prime opponent of the proposal to include the judiciary in a council of revision, objected to the courts' judging "the policy of public measures," precisely in recognition of the judiciary's "power of deciding on their Constitutionality." 1 *The Records of the Federal Convention of 1787,* at 97–98 (J. Madison) (M. Farrand ed. 1966) [hereinafter cited as Farrand].

Petitioners concede that respondents' complaint does not present a political question, as they must under the *Pocket Veto Case,* 279 U.S. 655 (1929), and *Wright v. United States,* 302 U.S. 583 (1938). Like the plaintiffs in these earlier pocket veto cases, respondents seek only the exercise of the courts' traditional role of adjudicating "cases of a Judiciary Nature." 2 Farrand at 430. The irony of petitioners' invoking the rejected council of revision, which would have possessed the power to negative the Legislature's enactment of laws, should not be lost, in this suit to redress the President's abuse of his qualified veto power.

In order to be able properly to leave political decisions to the political processes, the Court has a special role in safeguarding the political process itself, including the legislative process. The Court has recognized that remitting a litigant to the exercise of his "right to assert his views in the political forum or at the polls," *Richardson,* 418 U.S. at 179, requires a judicial willingness to police the electoral process, because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined," *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). Justice Powell has accordingly described *Baker v. Carr* as "perhaps a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine democratic processes." *Richardson,* 418 U.S. at 195 n.17 (Powell, J., concurring).[18] Similarly, recognition of the prudential "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches," *Allen v. Wright,* 468 U.S. at 751, requires a correlative judicial willingness to enforce an outcome, such as the enactment of H.R. 4042 into law, that was produced by the representative process.[19]

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[18] *Accord* J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 73–104 (1980) (viewing central function of judicial review as reinforcing representative system by policing representative process in order to leave selection of substantive values to political process); Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 Harv. L. Rev. 1265, 1298 (1961) ("It is possible, indeed, to regard the enforcement of the election laws as unique. If the citizen is to be remitted to 'the political process' for protection, he has a strong argument for enforcement of the legally established conditions of the franchise.").

[19] Because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers," *Allen v. Wright,* 468 U.S. at 752, we have analyzed the separation-of-powers implications as a question of Article III standing. However, because "case-or-controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief,' " *Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 499 (1974)), prudential doctrines have been applied to reflect the separa-

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D. Respondents Have Standing to Require Petitioners to Perform Ministerial Duties Necessary to Effectuate Their Votes

In order to vindicate the effectiveness of their votes to enact H.R. 4042 into law, respondents sued to require the petitioners to perform ministerial duties that implement the constitutional design for the legislative process by requiring the preservation and publication of bills that have become law. 1 U.S.C. §§ 106a, 112, 113 (Supp. III 1985) (requiring Archivist to receive, to preserve, and to publish all bills that have become law). Respondents have standing to obtain a judicial declaration that petitioners are required to perform the ministerial duties required by these laws.

Petitioners contend that respondents lack standing to compel adherence to these requirements, because they believe that "[r]espondents have nothing more than a 'generalized interest' (*Reservists,* 418 U.S. at 217), shared by all citizens, in the availability of public notice of the laws of the United States." Pet. Br. 28. Further, they argue that the statutes requiring preservation and publication of laws create no "right of action by Congress or anyone else to litigate" the constitutional question of whether H.R. 4042 became a law. *Id.* at 29.[20]

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tion-of-powers concerns implicated by congressional-plaintiff actions. *See, e.g., Goldwater,* 444 U.S. at 997–1002 (Powell, J., concurring) (ripeness); *Riegle v. Federal Open Market Committee,* 656 F.2d 873, 877–82 (D.C. Cir.), *cert. denied,* 454 U.S. 1082 (1981) (equitable discretion); McGowan, *Congressmen in Court: The New Plaintiffs,* 15 Ga. L. Rev. 241 (1981) (same). For the reasons we have discussed, separation-of-powers considerations support the adjudication of this action, whether viewed through standing doctrine or prudential analysis.

[20] Petitioners also dispute their amenability to suit, because "whether a particular bill has become a law is a matter to be resolved by the delivering official (here the President), not by the Archivist," and because the Executive Clerk of the White House, who acts as the President's agent in delivering bills, is not explicitly mentioned by statute. Pet. Br. 30 n.23. Respondents sued the same officers, the Administrator of General Services and the Executive Clerk of the White House,

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Petitioners misconceive the basis for respondents' standing, which, as we have discussed above, inheres in their interest in vindicating the effectiveness of their votes. Respondents do not assert that the preservation and publication statutes confer upon them a basis for standing that exists independently of their cognizable interest in vindicating their votes to enact H.R. 4042. Rather, respondents have standing to seek an order requiring petitioners to perform these ministerial duties, because it is petitioners' failure to do so that has nullified respondents' votes. Respondents' "injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge,* 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976)).

In putting into effect the Constitution that many of its members had participated in drafting, the First Congress enacted into law its understanding that the preservation of laws is the natural completion of the process of their enactment, by enacting the predecessor to the statutes at

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who have been named as defendants, without objection from petitioners' predecessors, in previous congressional challenges to pocket vetoes. *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974); *Kennedy v. Jones,* 412 F. Supp. 353 (D.D.C. 1976). Following the statutory transfer of duties from the GSA Administrator to the Archivist, *see* National Archives and Records Administration Act of 1984, Pub. L. No. 98–497, § 107(d), 98 Stat. 2291 (amending 1 U.S.C. §§ 106a, 112, 113 (Supp. III 1985)), the Acting Archivist was substituted as a defendant for the Administrator.

Respondents sued petitioners because of their contention that the Executive Clerk has the duty "to deliver [bills] that have become law to the [Archivist] for publication" and the Archivist has the duty "to receive bills that have become law and publish them." J.A. 23; J.A. 58. In two and one-half years of litigation, the petitioners have never questioned the accuracy of that description of their responsibilities. Having failed to raise such an objection in a timely manner, so that respondents could have conducted discovery relating to petitioners' job duties or amended their complaints if necessary, petitioners cannot present initially to this Court a question over their amenability to suit, which is beyond the scope of the questions presented by their petition for certiorari.

issue today. The First Congress assigned to the Secretary of State the duty to receive from the President and to "carefully preserve the originals" of all bills that had become law, including those bills that became law for not having been returned to the Congress with objections. Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. Respondents seek the performance of the identical duty by the Acting Archivist, who has inherited the Secretary of State's original responsibility of preserving enacted laws. 1 U.S.C. § 106a (Supp. III 1985).

In addition to preservation, the First Congress established the related principle that completion of the lawmaking process requires the recording and publication of the laws. It charged the Secretary of State with the duty, on receiving bills that had become law, to "cause the same to be recorded in books to be provided for the purpose," to publish them in public newspapers, and to "cause one printed copy to be delivered to each Senator and Representative of the United States, and two printed copies duly authenticated to be sent to the Executive authority of each State." Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. Recording and publication are now merged in the requirement that the Archivist cause the publication in slip form of "every Act and joint resolution, as soon as possible after its approval by the President, or after it has become a law under the Constitution without his approval." 44 U.S.C. §§ 709–710 (1982 & Supp. II 1984). The Archivist must also cause the publication in the Statutes at Large of "all the laws . . . enacted during each regular session of Congress." 1 U.S.C. § 112 (Supp. III 1985).

Just as the First Congress charged the Secretary of State with the duty of delivering to each Senator and Representative a copy of each printed law, current law continues to reflect Congress's direct interest in the receipt of printed evidence of its laws by requiring the Archivist to cause the publication of all laws and by permitting Congress's "Joint Committee on Printing [to] control

the number and distribution of the copies" of the slip laws and the Statutes at Large in which they are published. 44 U.S.C. §§ 709, 728 (1982).[21] Thus, respondents remain explicit beneficiaries of the requirement that enacted laws be published, and they are "within 'the zone of interests to be protected,'" *Valley Forge*, 454 U.S. at 475 (quoting *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970)), by the publication requirement.

Petitioners slight respondents' interest in compelling adherence to the statutory preservation and publication requirements by analogizing this action to an attempt to obtain "notice of H.R. 4042," Pet. Br. 28, or "a copy of a bill that had become a law," *id.* at 29. Petitioners' injury to respondents' legislative role does not lie in petitioners' failure to provide notice or copies of H.R. 4042 to respondents, but in their failure to perform the duties necessary to complete the process by which H.R. 4042 was enacted into law. This Court has noted, in referring to a law that had received the President's approval, that "when a bill thus attested [by the presiding officer of each House], receives his approval, *and is deposited in the public archives,* its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Field v. Clark*, 143 U.S. 649, 672 (1892) (emphasis added). Further, under federal law the "Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States, . . ." 1 U.S.C. § 112 (Supp. III 1985); *see id.*, § 113 (same for slip laws).

Thus, it is the publication of a statute and its preservation in the National Archives that provide the official notice of its enactment to the public. Once a statute has

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[21] Current law has altered the means of *distribution* to Congress of published laws from the individuated distribution provided in 1789. However, notwithstanding the characterization of aspects of the earlier law as "archaic" (Pet. Br. 29 (quoting S. Rep. No. 1714, 82d Cong., 2d Sess. 2 (1952))), the basic publication requirement continues without change to reflect Congress's interest in receiving printed copies of all enacted laws.

been published and preserved, any party may take notice of it and is free to initiate legal action, if necessary, to secure its benefits. However, before a bill has been "deposited in the public archives its authentication as a bill that has passed Congress" is not "complete and unimpeachable," and before it has been published, it is not contained in the body of "legal evidence of laws . . . in . . . the courts." Until petitioners perform their statutory duties of preserving and publishing H.R. 4042 as a law, the legislative process has not been completed and petitioners continue to inflict upon respondents the injury of nullifying their enactment.

II. THIS REMAINS A LIVE CONTROVERSY

This dispute remains a live, justiciable controversy, because the petitioners' refusal to preserve and publish H.R. 4042 as a law continues to injure respondents. Petitioners' suggestion that the action is moot rests upon their view that its vitality is dependent upon the current fiscal consequences of H.R. 4042. This argument fails because, like petitioners' challenge to respondents' standing, it is based upon a mischaracterization of the suit as an attempt to enforce the substantive provisions of H.R. 4042. Because respondents seek to enforce, not H.R. 4042, but the statutory provisions that implement the legislative process by requiring the preservation and publication of enacted laws, the existence of a justiciable controversy is not determined by the current substantive effect of H.R. 4042.

Beginning with the First Congress, the Congress has required the publication of "every" law. Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. When the Congress first provided for a permanent official record of its enactments in the Statutes at Large, it directed the Attorney General to enter into a contract with Little and Brown for a work containing all laws "whether obsolete, repealed, or in force, and whether temporary or permanent. . . ." Act of March 3, 1845, No. 10, § 2, 5 Stat. 798, 799. The Archivist must include in the Statutes at Large "all" the laws "enacted during each regular session of Congress." 1 U.S.C. § 112 (Supp. III 1985). In performing these ministerial functions, the petitioners must cause to be published all bills that have become law without judging the effectiveness of any of them. Neither Congress's interest in the preservation and publication of laws that it has enacted, nor petitioners' correlative procedural duties under statute, are affected in any way by the substantive content of the laws.

The cases regarding subsequent changes in law, which petitioners cite to suggest that this controversy is moot, Pet. Br. 10, are therefore inapposite. It is undoubtedly true that a suit to challenge or to enforce a statute is moot once that statute has been repealed. *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam). Here, however, the preservation and publication statutes that respondents sued to enforce have not been repealed since this action was filed, but remain in full force and effect.[22]

The Court's analysis in *Coleman* demonstrates that the cognizability of respondents' interests is not affected by the current effect of the law whose publication they seek. In *Coleman* the Court held that a group of Kansas state legislators had a cognizable "interest in maintaining the effectiveness of their votes," 307 U.S. at 438, without ascertaining the substantive effect of their votes. The legislators were not required to demonstrate that their vote on Kansas's ratification of a constitutional amendment would determinatively affect the ultimate ratification or failure of the amendment. Rather, the Court found that the legislators had standing to obtain a simple determination whether Kansas was to be recorded as having ratified the amendment. Respondents have a similarly cognizable interest in securing a declaratory judgment that

[22] The only change that has been made in these laws is a transfer of identical duties from the Administrator of General Services to the Archivist to reflect the Archives' separation from GSA. *See* n. 20 *supra*.

H.R. 4042 is a law that must be preserved and published.[23]

To the extent that the current effectiveness of H.R. 4042 is an issue, there are continuing legal consequences to the question whether H.R. 4042 was a duly enacted limitation on appropriations during fiscal year 1984. The financial accountability laws of the United States require that consideration be given, after the end of a fiscal year, to the lawfulness of expenditures under all laws that were in effect during that year. The Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) (1982), prohibits federal employees from authorizing the expenditure of funds beyond appro-

[23] *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982), does not undermine the vitality of respondents' claim. In *NOW* the Court ordered dismissed as moot a challenge to practices regarding ratification of the Equal Rights Amendment. The Administrator of General Services, who had the statutory duty to record states' ratification votes, contended successfully that, because the extended date for ratification of the Amendment had expired, "the Amendment has failed of adoption no matter what the resolution of the legal issues presented here, and the Administrator . . . will not certify to Congress that the Amendment has been adopted." Memorandum for the Administrator of General Services Suggesting Mootness at 3, *NOW v. Idaho*. Here, in contrast, if the Court affirms, petitioners will be obliged to cause H.R. 4042 to be published as a law. Unlike *NOW*, respondents do not claim a cognizable interest in obtaining the recordation in the House or Senate Journals of their futile votes in favor of a defeated measure. Rather, they seek vindication of their votes that succeeded in enacting a law.

Petitioners miss the import of this distinction when they state that H.R. 4042 "can enjoy no greater legal status at this late date than could the unsuccessful constitutional amendment at issue in *NOW*." Pet. Br. 12 n.7. The source for petitioners' confusion is apparent in their statement that "[r]egardless of whether H.R. 4042 ever *was* a law, it plainly is not *now* a law, and no form of judicial relief can change that fact." *Id.* at 9 (emphasis in original). For purposes of art. I, §7, only consistency with the mandated process for lawmaking is relevant to the identification of enacted laws. The substantive effect of legislation is not germane to its status as an enacted law under Article I. Thus, respondents' continued interest in securing H.R. 4042's preservation and publication as a law is not diminished by attenuation of the bill's substantive effect.

priations limitations. The Act is violated by an expenditure of funds in disregard of a substantive spending limitation as well as by an expenditure in excess of appropriated amounts. 60 Comp. Gen. 440 (1981). Therefore, if H.R. 4042 is a law, the Anti-Deficiency Act would render unlawful any expenditures of funds that occurred in fiscal 1984 in disregard of the requirements contained in H.R. 4042.

The requirements of the Anti-Deficiency Act do not erode with the end of a particular fiscal year. The Act requires that, "[i]f an officer or employee of an executive agency . . . violates section 1341(a) . . . of this title [31 U.S.C.], the head of the agency . . . shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351 (1982). The Act contains no statute of limitations extinguishing this reporting obligation. Thus, if H.R. 4042 is a law, the Secretary of State is obligated by law to "report immediately to the . . . Congress all relevant facts and a statement of actions taken" relative to any expenditure of funds that occurred in fiscal year 1984 in disregard of the restrictions of H.R. 4042. If it were necessary to show a continuing legally cognizable interest of the Congress in the status of H.R. 4042 beyond the vindication of its role in the lawmaking process, this statutory reporting obligation, owed directly to the Congress, would establish the requisite continuing injury to respondents from petitioners' failure to preserve and to publish H.R. 4042 as a law.[24]

[24] The Secretary of State might well report that, because the expenditures in disregard of H.R. 4042 were made in a good-faith belief that H.R. 4042 was not a law, remedial action against the expending officials, *see id.*, §§ 1349(a), 1350, is not warranted. It is likewise possible that the Secretary would report that it is impossible to recoup the unlawfully expended funds. Notwithstanding the possibility of those ultimate results, the determination that H.R. 4042 is a law will have the direct legal consequence of requiring the Secretary of State to report to the Congress on any funds expended in violation of H.R.

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In addition, all executive agencies are required to audit their financial accounts. *Id.*, § 3521. The Comptroller General of the United States shares authority, acting as an agent of the Congress, *see Bowsher v. Synar,* slip op. at 11–16, to audit, 31 U.S.C. §§ 3523–3525 (1982), and to settle the accounts, *id.*, § 3526, of executive agencies. Any official who certifies the payment of a voucher that is prohibited by law is legally responsible, unless he is properly relieved, for repaying the amount. *Id.*, § 3528. It is possible that the good-faith belief of certifying officials that H.R. 4042 was not a law would warrant relieving them of legal liability to repay any unlawful expenditures. *Id.*, § 3528(b)(2)(A). Nevertheless, the account-settlement process is not complete until three years have passed from the submission of accounts for the period covered by the account. *Id.*, § 3526(c)(1); 62 Comp. Gen. 498, 502 (1983). Thus, until October 1987 at the earliest—three years from the close of fiscal year 1984—the Comptroller General will continue to have the statutory obligation to settle the accounts covered by H.R. 4042 as necessary.[25] Because the Comptroller General performs his auditing duties on behalf of the Congress, *see Bowsher,* slip op. at 15–16, respondents are the direct beneficiaries of this activity. Accordingly, respondents continue to be entitled to a determination that H.R. 4042 is a law.

4042. Congress's entitlement to receive this report establishes its continued benefit resulting from the publication of H.R. 4042 as a law, regardless of the nature of the administrative actions described in the report.

[25] To assure that agency records are available for audits by the Comptroller General, the Comptroller General may require agencies to keep records for a period of not more than ten years. *Id.*, § 3523(c)(1).

III. H.R. 4042 IS A LAW BECAUSE THE ADJOURNMENT OF THE FIRST SESSION OF THE NINETY-EIGHTH CONGRESS DID NOT PREVENT THE PRESIDENT FROM RETURNING H.R. 4042 WITH HIS OBJECTIONS

A. The Scope of the Pocket Veto Power Is Circumscribed by Its Narrow Rationale

The Constitution permits use of a pocket veto only when Congress has "prevented" a bill's return. Therefore, the narrow question posed by the merits of this case is whether the President was prevented from returning H.R. 4042 to the Congress with his objections. Because a pocket veto is not subject to Congress's authority to override, the delineation of the scope of the pocket veto power is critical to the division of the lawmaking responsibility between the political Branches. The provisions of Article I that "define the respective functions of the Congress and of the Executive in the legislative process. . . . are integral parts of the constitutional design for the separation of powers." *Chadha,* 462 U.S. at 945, 946. "[T]o vindicate the principle of separation of powers . . . the purposes underlying the[se provisions must] . . . guide our resolution of the important question presented. . . ." *Id.* at 946. The proceedings at the Constitutional Convention demonstrate that the pocket veto power was designed as a narrow, defensive mechanism to safeguard the President's ability to require Congress to reconsider bills, not as an offensive device to foreclose the possibility of reconsideration.

The Framers determined that the opportunity for Congress to override Presidential vetoes was an essential element of the lawmaking process. Thus, they gave to the President only a *"limited and qualified power* to nullify proposed legislation by veto." *Id.* at 947 (emphasis added). In extended debate, the Framers roundly criticized an alternative proposal to give the President an absolute veto. Benjamin Franklin objected that such a power would render "the Legislature into a compleat subjection to the

will of the Executive." 1 Farrand at 99. Roger Sherman spoke against "enabling any one man to stop the will of the whole," because "[n]o one man could be found so far above all the rest in wisdom." *Ibid.* George Mason believed that an absolute veto would "give up all the rights of the people to a single Magistrate." *Id.* at 102. When the proposal for an absolute Presidential veto came to a vote, the Convention rejected it unanimously.[26]

By providing the President with a qualified veto, subject to override by two-thirds' vote of both Houses of Congress, the Framers accepted the view that "we ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.* at 99 (Roger Sherman). Accordingly, an essential element of the Constitution's "finely wrought and exhaustively considered" lawmaking procedure, *Chadha*, 462 U.S. at 951, requires that all bills be presented to the President for his signature or disapproval, and that "[t]he President's unilateral veto power, in turn, [i]s limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person." *Ibid.* Because the pocket veto functions as an absolute veto, the Court must be principally guided in interpreting its scope by the fundamental importance with which the Framers viewed Congress's power to override a Presidential veto.[27]

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[26] The absolute veto was rejected by a vote of ten states to none, *id.* at 103, with only three members of the Convention recorded in support, *id.* at 108.

[27] Prime among the elements that Alexander Hamilton noted as distinguishing the Executive under the Constitution from the British monarchy was that "[t]he qualified negative of the President differs widely from th[e] absolute negative of the British sovereign. . . ." *The Federalist No. 69*, at 445 (B. Wright ed. 1961). Hamilton's description manifests that the Framers did not even view the President's authority as a "veto," a word that does not appear in the Constitution, but as the "power of returning all bills with objections." *The Federalist No. 73*, at 468.

As the Court has explained, the veto provisions contained in Article I, Section 7, Clause 2 were created to protect the integrity of the carefully balanced system that the Framers designed for sharing legislative power between the Branches:

> The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. *Edwards v. United States*, 286 U.S. 482, 486 [(1932)].

Wright v. United States, 302 U.S. 583, 596 (1938). The Court has been careful "not [to] adopt a construction which would frustrate either of these purposes." *Ibid.* To maintain both purposes, use of the pocket veto power must be limited to its intended defensive function: to ensure that the President has a full ten days to consider whether to approve or to veto legislation and may effectuate a veto within that time by returning the bill to the Congress. If Congress attempts to deprive the President of the use of the full ten-day period or of the opportunity to return a bill, the provision guarantees that he will be able to veto bills notwithstanding Congress's actions. However, if Congress provides the President with both the full ten days to consider legislation and the ability to return a veto—as Congress did here, by the originating House's appointment of an agent to receive messages from the President—the Constitution mandates "that the Congress shall have suitable opportunity to consider his objections" and to override his veto.[28]

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[28] *Ibid.* As this Court has recognized, the pocket veto is the counterpart to the ten-day limit on Presidential consideration of enacted bills. *Edwards*, 286 U.S. at 486; *accord* Pet. App. 22a–23a. Just as the ten-day limit ensures that the President cannot withhold action on a bill to prevent Congress from overriding his objections to it, so the pocket veto guarantees that Congress cannot preclude a Presidential veto.

Constitutional provisions must be interpreted "in light of the evil the Framers had sought to bar." *United States v. Brown*, 381 U.S. 437, 447 (1965). Only one interpretation fully achieves both purposes of the Framers. Both the President's ability to consider bills for ten days and the Congress's ability to enact bills over the President's objections are safeguarded when use of the pocket veto is restricted to adjournments during which reconsideration is "prevented" either because the originating House has failed to arrange for the acceptance of veto messages, or because the Congress has terminated. In either of these circumstances, return is "prevented" and a pocket veto must be used to effect a veto. In any other circumstance, the President's constitutional prerogative is fully protected by use of a return veto, and exercise of a pocket veto would unnecessarily deprive Congress of its constitutional right to reconsider bills and to override the President's veto.

During all non-final adjournments, appointment of an agent to receive Presidential messages guarantees that the President can exercise his veto power by returning bills with his objections.[29] Professor Charles Black has persuasively explained the effect that Congress's designation of an agent to accept veto messages has on the President's use of his pocket veto authority:

> The "pocket veto" was put into Article I to prevent Congress' frustrating the President's veto power by adjournment. When Congress sets up arrangements

[29] There are three types of congressional adjournments. "Intrasession" adjournments are breaks within a session taken at the end of each day, over weekends, and for holidays or election campaigns. "Intersession" adjournments separate the two sessions of each Congress. "Final" adjournments occur every two years at the end of a Congress. In addition to adjourning, Congress takes "recesses." However, the difference between a "recess" and an "adjournment" is of only parliamentary, not constitutional, significance. *Compare* F. Riddick, *Senate Procedure*, S. Doc. No. 2, 97th Cong., 1st Sess. 1 (1981) (adjournment) *with id.* at 869 (recess). A House may choose to adjourn for as little as a few seconds or to recess for months.

> which eliminate that effect of adjournment, there is no reason why the "pocket veto" should continue to have force; indeed, it no longer has any warrant in the literal text, if one reads that text freshly. The text does not say, or necessarily imply, that adjournment will always "prevent" return; it provides only for the case where it does.

Black, *Some Thoughts on the Veto*, 40 Law & Contemp. Probs., spring 1976, at 87, 101 (emphasis omitted). An intersession adjournment during which the Houses have arranged for the receipt of Presidential messages, as is involved here, neither frustrates the President's veto power nor forecloses Congress's right to override. All pending legislative business carriers over from the first session.[30] Congress may reconsider in its second session a bill that the President vetoed during its first session.[31] Similarly,

[30] *See* Standing Rules of the Senate, S. Doc. No. 13, 99th Cong., 1st Sess. 13 (1985) (Rule XVIII) ("At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place."); Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 277, 98th Cong., 2d Sess., § 901, at 630 (1985) (House Rule XXVI) ("All business before committees of the House at the end of one session will be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place.").

[31] *See, e.g.*, H.R. 1562, 99th Cong. (House sustained during second session President Reagan's veto during first session); Pub. L. No. 94-206, 90 Stat. 3 (1976) (Congress overrode during second session of 94th Congress President Ford's veto of H.R. 8069 during first session); S. 183 and H.R. 6136, 49th Cong. (House sustained during second session President Cleveland's veto during first session); H.R. 392, 33d Cong. (House sustained during second session President Pierce's veto during first session); H.R. 14, 27th Cong. (House sustained during second session President Tyler's veto during first session); *see* 132 Cong. Rec. H5506 (daily ed. Aug. 6, 1986); 131 Cong. Rec. H12830 (daily ed. Dec. 17, 1985); Senate Library, U.S. Senate, *Presidential Vetoes, 1789-1976*, at 15, 22-23, 64, 78, 459 (1978).

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during its second session Congress may properly consider whether to override a veto exercised during its intersession adjournment—but only if the President has returned the bill with his objections.

The alternative interpretation proffered by petitioners (Pet. Br. 44-45)—that the President be permitted to pocket veto whenever Congress has adjourned for more than three days—in contrast would subvert the Framers' purposes by substantially converting the President's qualified authority to return bills to Congress into the absolute veto power that the Constitutional Convention unanimously rejected. The petitioners' interpretation would transform the pocket veto authority from its intended purpose, as a defensive mechanism to safeguard the President's role, into an offensive device through which the President could regularly deprive Congress of its opportunity to consider whether to override.[32] Such a transformation of the terms upon which the Legislative and Executive Branches share the lawmaking authority

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A different legislative circumstance is presented only by a final adjournment. A final adjournment is the expression of Congress's determination not to resume legislative business. Return of a bill would be futile, because the new Congress could not override the veto of the previous Congress's bill: all legislative business starts anew. *See* Kennedy, *Congress, the President and the Pocket Veto,* 63 Va. L. Rev. 355, 381 (1977).

[32] The Attorney General noted before the Supreme Court in *Edwards v. United States* the "large number of bills presented to Presidents at the end of sessions of Congress in modern times," and stressed the importance to the "public interest" of adopting a construction of art. I, § 7 that took account of that fact. 286 U.S. at 484. Congress's modern practice is to take a number of adjournments in each session, as well as a limited adjournment between sessions. For example, in the period of President Reagan's tenure Congress has adjourned for more than three days thirty-seven times. *See* Addendum I, p. 69 *infra;* Addendum II, pp. 71-72 *infra.* Petitioners' interpretation would have permitted the President to pocket veto, and thus to negative absolutely with no opportunity for Congress to override, all of the bills that Congress enacted shortly before these adjournments. *See* Brief for the Speaker and Bipartisan Leadership Group of the United States House of Representatives, Addenda I and II.

under the Constitution is irreconcilable with the Framers' intent.[33]

The sole constitutional value that petitioners invoke to support their view that Congress's adjournment necessarily prevented the President from returning H.R. 4042 is their observation that the President's disapproval of a bill "was to be regarded as a momentous occasion of disagreement between the political Branches." Pet. Br. 37. From this unobjectionable fact, the petitioners infer that "[t]o accord significance to the presence of an agent [of Congress] would trivialize the formal return of a bill by the President." *Id.* at 39. They do not explain, however, why return of vetoes to a congressional agent "trivializes" the veto process while the return by a Presidential agent does not.[34] Nor do petitioners explain why use of a congressional agent "trivializes" the veto process while the use of agents by both Congress and the President does not equally "trivialize" the process by which bills are "pre-

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[33] As the court of appeals cogently stated, petitioners' three-day adjournment rule would "frustrate the goal of protecting Congress's right to overrule presidential disapproval without furthering the goal of protecting the President's opportunity to disapprove of legislation." Pet. App. 45a. The court soundly rejected petitioners' argument that "the three-day limit imposed by Article I, Section 5, Clause 4 on the length of an adjournment that can be taken without the concurrence of both Houses . . . should also be regarded as the constitutionally specified dividing line between those adjournments that 'prevent' the President from returning a bill for immediate reconsideration by Congress and those brief recesses that do not unacceptably postpone such reconsideration." Pet. Br. 44. The court concluded that "there is strong reason to believe that the Framers intended no such connection whatsoever," Pet. App. 43a-44a, "between the pocket veto clause and the clause governing adjournment by one house," *id.* at 43a, and that petitioners' "choice of three days as a bright line thus appears to have no textual grounding at all," *id.* at 44a. *See* pp. 48-49 *infra.*

[34] *See* J.A. 65 (Declaration of petitioner Ronald R. Geisler, Executive Clerk of White House) ("It is part of my duties to physically deliver a veto message from the President. . . .").

sented to the President of the United States." U.S. Const., art. I, sec. 7, cl. 2.[35]

The carefully balanced provisions of Article I, section 7 that culminate in "Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power . . . ." *Chadha*, 462 U.S. at 957. "To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." *Id.* at 957–58. The irony of petitioners' position is that, out of regard for the "momentousness" of disagreements between the Congress and the President over legislation, they propose discarding the Framers' carefully designed prescription for resolving such disagreements—the power of Congress to override the President on two-thirds' vote. The Executive's attempt to deviate from the legislative scheme established in Article I reflects "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" and "must be resisted." *Id.* at 951.

B. The Adjournment of the First Session of the Ninety-Eighth Congress Did Not Prevent the President From Returning H.R. 4042 With His Objections

The Court's previous adjudications of the pocket veto provision establish that, because "Congress by their Adjournment" between sessions of the Ninety-Eighth Congress did not "prevent [H.R. 4042's] Return" to the House of Representatives, "the Same shall be a Law, in like Manner as if [the President] had signed it." U.S. Const., art. I, sec. 7, cl. 2. The Court established in the *Pocket Veto Case*, 279 U.S. 655, 680 (1929), that "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill . . . ." Because the House of Representatives had appointed an agent to accept messages from the President during its adjournment, Congress did not prevent the President from returning H.R. 4042 to the House.

1. *The Court Has Established That the President May Constitutionally Return Bills to Congress During Adjournments Through Delivery to Agents*

In its first resolution of a pocket veto question, the *Pocket Veto Case*, the Court sustained President Coolidge's pocket veto of a Senate bill during the five-month intersession adjournment of the Sixty-Ninth Congress, rejecting the argument of beneficiaries of the bill that the pocket veto had been ineffective. *Ibid.* The Court first observed that neither House had provided authorization for an agent to receive vetoed bills from the President during an adjournment and then added in *dictum* that "the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate."[36] Because there was no practice of accepting Presidential messages during an adjournment, the Court concluded that return to an agent could engender disputes over the date of delivery of a bill and public

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[35] *Accord Wright*, 302 U.S. at 590:

> There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent of the legislative body?

[36] *Id.* at 684. The Department of Justice has shared the understanding that this portion of the Court's opinion was dictum. *See Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess.* 18 (1971) (testimony of then-Assistant Attorney General Rehnquist); Brief for the Appellants 30 n.21, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

uncertainty about a bill's status.[37] The Court found that delivery to a House in session would remove those concerns.[38]

Nine years later in *Wright v. United States,* 302 U.S. 583 (1938), the Court ruled that delivery to a House in session is not the only solution to these problems. At issue there was President Roosevelt's return veto of a Senate bill while the Senate was in a three-day recess, but the House of Representatives was sitting. The Secretary of the Senate had accepted the veto message and had presented it to the Senate when it reconvened. The Court rejected the plaintiff's claim, based squarely on the Court's earlier opinion in the *Pocket Veto Case,* that the President's return veto had been invalid. The Court held, "In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return." *Id.* at 589. The Court noted that its contrary statement in the *Pocket Veto Case* that the Constitution forbade return of a bill to an officer during an adjourn-

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[37] The Court explained that as of 1929, "Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and . . . there is no rule to that effect in either House. . . ." 279 U.S. at 684.

[38]

> [I]t was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

Id. at 684–85.

ment was *dictum* and did not control its judgment. *Id.* at 593–94.[39]

The Court based its holding in *Wright* that return of the bill through delivery to a Senate officer during a recess constituted an effective veto on its observation that there was no "practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill." *Id.* at 589–90. The Court examined the dangers of "no certain knowledge" over the bill's legal status and "undue delay" in its reconsideration, which had motivated the Court's decision in the *Pocket Veto Case,* and concluded, based upon "the manifest realities" of the brief recess at issue, that the dangers were "wholly chimerical." *Id.* at 595. Thus, the Court established in *Wright* that, contrary to its earlier statement in the *Pocket Veto Case,* the use of congressional agents to receive veto messages from the President during an adjournment is not flatly prohibited by the Constitution. Instead, whether the President is constitutionally able to return a bill to Congress through delivery to an appointed congressional agent depends upon whether the potential dangers of un-

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[39] Petitioners maintain unconvincingly that in *Wright* "[t]he Court was careful, however, not to disturb the rule of the *Pocket Veto Case.*" Pet. Br. 43. The extent of the Court's limitation in *Wright* of its dictum in the *Pocket Veto Case* is evident from its reliance in *Wright* on the brief that Representative Sumners had filed nine years earlier in the *Pocket Veto Case.* The House Judiciary Committee did not appear in *Wright* as it had in the *Pocket Veto Case,* but the Court in retrospect found so much merit in Representative Sumners' argument that it took the unusual step of summoning up and reciting at length his clear statement of the "practical considerations" that govern the presentment and return of bills. *See Wright,* 302 U.S. at 590–92. Those considerations included the observations that the Constitution did not forbid the use of agents, that the President regularly used agents to receive bills, and that the imposition of a formal requirement of personal receipt by Congress and the President would cause unnecessary delays and complications. *Ibid.*

certainty and delay arising from such a return veto are "real" or "illusory." *Ibid.*[40]

Petitioners offer a strikingly different reading of the *Pocket Veto Case* and *Wright*. They note that the adjournment at issue in the *Pocket Veto Case* occurred between sessions of the Sixty-Ninth Congress, while in *Wright* the originating House was recessed for three days. Pet. Br. 39–42. Petitioners deduce from these two facts that the sole distinction that underlay the Court's determinations that a pocket veto was appropriate in the *Pocket Veto Case* while a return veto was suitable in *Wright* was the fact that the former veto occurred during an adjournment of the Congress, while the latter occurred while only the originating House was in recess. *Id.* at 42–43. Thus, petitioners argue that because H.R. 4042 was pocket vetoed during an intersession adjournment, the result in the *Pocket Veto Case* is "controlling here and require[s] reversal of the judgment below." *Id.* at 39.

Although the Court in *Wright* noted the difference between the two types of adjournments, 302 U.S. at 587–89, it did not rest its decision solely on that difference, but instead followed its admonition in that *Pocket Veto Case* that the type of adjournment does not resolve whether return was "prevented." The Court therefore proceeded to examine the concerns that had underlain its *Pocket Veto* decision and found them "inapposite to the circumstances of this case," *id.* at 593, because "[w]hen there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may

[40] In 1974 in *Kennedy* v. *Sampson*, the D.C. Circuit applied this "exception—or, at least, . . . a logical extension of the exception—to the *Pocket Veto Case* established in *Wright*," 511 F.2d at 440, to conclude that modern intrasession adjournments of Congress do not prevent the return of bills through delivery to designated congressional agents. The Executive chose not to petition for certiorari in that case and has been using return vetoes during intrasession adjournments ever since. *See* pp. 59–61 *infra*.

be reconsidered immediately after the short recess is over," *id.* at 595.

Moreover, the Court's decision in *Wright* expressly forecloses the constitutional interpretation that petitioners proffer. Petitioners contend that the requirement of Article I, section 5, clause 4, that each House obtain the permission of the other House to adjourn for more than three days "should also be regarded as the constitutionally specified dividing line between those adjournments that 'prevent' the President from returning a bill for immediate reconsideration by Congress and those brief recesses that do not unacceptably postpone such reconsideration." Pet. Br. 44. This rule would permit use of the pocket veto when one House was adjourned for more than three days, but the other House was sitting. However, in *Wright* the Court held precisely that an adjournment of one House is *not* an adjournment of the Congress within the meaning of the pocket veto provision. 302 U.S. at 587–88. The contrary holding would irrationally render the President "prevented" from returning a bill to the originating House even when it is in session, merely because the other House is adjourned for more than three days.[41] The three-day rule of Article I, section 5, clause 4 provides no useful guidance on the scope of the pocket veto power.

Contrary to the petitioners' formalistic view, the *Pocket Veto Case* and *Wright*, read together, require the application of two guiding principles. First, "under the constitutional provision the determinative question" is not what type of adjournment occurred, but whether the adjournment "is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." 279 U.S. at 680. Second, to answer that inquiry it is necessary to conduct a realistic appraisal

[41] *See Kennedy v. Sampson*, 511 F.2d at 440 ("[I]t is difficult to see how the presence or absence of the non-originating House at the time of the return could affect our decision.").

whether use of a return veto would generate constitutionally unacceptable uncertainty or delay.[42]

2. The President's Return of Bills to Congressional Agents During Modern Adjournments Creates No Constitutional Difficulties

The "manifest realities" (*Wright*, 302 U.S. at 595) of Congress's modern adjournment practices reveal that, as long as the originating House has authorized an agent to accept veto messages, no serious risk remains of either public uncertainty over the status of a bill vetoed during an intersession adjournment or undue delay in reconsidering it when Congress convenes its second session. The Court's concern in the *Pocket Veto Case* about the uncertain status of a bill returned to Congress during an adjournment resulted from the lack at that time of a tradition of receipt of Presidential messages by congressional agents. 279 U.S. at 683–84. The Court feared that return

[42] The Court expressly disclaimed reliance in the *Pocket Veto Case* on the category of adjournment and focused instead on whether the adjournment, whatever its type, was one that prevented use of the return veto. The Court has never established a *per se* rule holding that all intersession adjournments necessarily prevent the return of bills. The fact that in *Wright* the Court was not establishing a constitutional distinction for pocket veto purposes between congressional adjournments and one-House recesses is evident from the Court's express reservation of cases that "may arise in which . . . a long period of adjournment may result. We have no such case before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect." 302 U.S. at 598. Thus, as the court of appeals recognized, "the Court expressly left open the possibility that its analysis would apply to render return to an agent effective in adjournments other than brief, one-house, intrasession adjournments." Pet. App. 29a.

In *Kennedy v. Sampson* the Executive proffered the identical factual distinction between the *Pocket Veto Case* and *Wright* to support the President's use of a pocket veto during a five-day intrasession adjournment of the Congress. *See* 511 F.2d at 439. The court rejected the Executive's reliance on the difference between a three-day adjournment of one House and a five-day adjournment of both Houses, because "[t]hese distinctions fail to overcome the logic and reasoning of the *Wright* decision." *Ibid.*

to an "agent not authorized to make any legislative record of its delivery . . . [would] leav[e] open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all." *Id.* at 684.

Because both Houses now formally direct agents to accept veto messages, contemporary practices have rendered the Court's concern "illusory." *Wright*, 302 U.S. at 595. During all contemporary intrasession and intersession adjournments and recesses, just as in the recess in *Wright*, "the organization of the House and its appropriate officers continue to function without interruption." *Ibid.* Continuation of the institutional functions of the Houses ensures a clear and certain public record of any messages received from the President, whether the Houses at the time are in a three-day recess or a nine-week intersession adjournment.[43] The nature of an adjournment does not affect the public recording of a Presidential veto, and return of bills to a congressional agent has never occasioned a dispute about the date, or fact, of their delivery.

Moreover, "uncertainty" is no longer a significant concern, regardless of Congress's formal recordkeeping practices. In recent years the President has made public announcements, often including messages to Congress and releases to the press, of both his return vetoes and his pocket vetoes. The statements accompanying both types of vetoes are printed contemporaneously in the Weekly Compilation of Presidential Documents and appear subse-

[43] The date and exact time of receipt of veto messages of House bills is recorded by the Clerk of the House of Representatives, when he receives the veto message from petitioner Geisler or his subordinate. The bill is then sent with a letter of transmittal to the Speaker, noting the time and date of receipt. *See, e.g.*, 132 Cong. Rec. H2 (daily ed. Jan. 21, 1986) (communication from Clerk of House) (noting that the Clerk had received veto messages from the President "[a]t 3:45 p.m. on Tuesday, January 14, 1986," and "[a]t 3:15 p.m. on Friday, January 17, 1986," during Congress's intersession adjournment).

quently in the Public Papers of the Presidents.[44] As the D.C. Circuit concluded in *Kennedy v. Sampson*, "Modern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen." 511 F.2d at 441.[45] Whatever circumstances prevailed in 1929, uncertainty about the status of a bill returned to Congress during an intersession adjournment is no longer a serious concern.[46]

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[44] The veto of H.R. 4042 was (1) publicly announced by the President's press spokesman, J.A. 35–36; (2) reported in the press, *see, e.g.*, N.Y. Times, Dec. 1, 1983, at A1; (3) reprinted in the Presidential documentary record, 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30, 1983); 1983–2 Pub. Papers 1636; and (4) noted in the Congressional Record, 129 Cong. Rec. D1604 (daily ed. Dec. 14, 1983).

[45] The court continued in *Sampson*,

> The status of such a bill would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session.

Ibid. (footnote omitted).

[46] Petitioners buttress their "uncertainty" argument by citing a document, apparently modeled after the New York Constitution, which was drafted for the use of the Committee on Detail at the Constitutional Convention. The draft contained much of the language of art. I, § 7, cl. 2, but provided that, if the President failed to sign a bill within the allotted period, and Congress's adjournment prevented the bill's return, the President could veto the bill by returning it when the originating House was next in session. *See* 2 Farrand at 160–62. Petitioners analogize this proposal to use of a return veto during a congressional adjournment and infer that "the most plausible explanation [for the draft's replacement with the pocket veto provision] clearly is that the Drafters were unwilling to permit the status of an unsigned bill to remain uncertain until such time as Congress might reconvene." Pet. Br. 36.

Petitioners' reliance on this document is misplaced for two reasons. First, we know of no evidence, and petitioners have offered none, about the role of the document in the Framers' deliberations. The rejection of the draft may have been the work of only two participants,

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Delay in Congress's reconsideration of a vetoed bill is never a sufficient ground alone to justify the President's use of a pocket veto instead of a return veto, because the potential for delay is not constitutionally relevant to the

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James Wilson and John Rutledge (*see* 2 Farrand at 152 n.14, 159 n.16, 163 n.17, 167), and the draft's author, Wilson, was one of the only three Framers who favored an absolute Presidential veto, *see* 1 Farrand at 108. It is not apparent whether any other member of the Committee on Detail, let alone of the Convention, ever saw this document or made any judgments about it.

Second, even if it had been a focus of the Framers' deliberations, this document would not be probative because, as petitioners candidly acknowledge (Pet. Br. at 36), there is no evidence supporting their explanation for the change over other equally plausible explanations. The court of appeals noted evidence suggesting that the Framers anticipated that Congress's adjournments between sessions would last for most of the year and that Congress would not carry over its unfinished business at its second session. Pet. App. 40a; *see* H.R. Doc. No. 277, *supra* n.30, § 901, at 630–31 (until 1818 each House began unfinished business anew in second session). That the refinement resulted from the Framers' expectation that Congress's schedule would render a return veto pointless is as likely as petitioners' supposition that they "were unwilling to permit the status of an unsigned bill to remain uncertain." Pet. Br. 36. In either event,

> the adjournment practices of Congress as envisioned by members of the Committee bear no resemblance to the actual adjournment practices of the modern-day Congress, and to accord determinative weight to the Committee's supposed views on whether intersession adjournments prevented return would therefore seriously disserve the larger purpose of the pocket veto clause as understood by the Supreme Court. Given that under the principles of *Wright* and the *Pocket Veto Case*, intersession adjournments no longer pose the least obstacle to the President's exercise of his qualified veto, it cannot be dispositive that the Committee of Detail may have believed they would.

Pet. App. 40a–41a (footnote omitted).

Because of the existence of equally plausible explanations for the change, and the absence of any contemporaneous explanation or rationale, petitioners' attempt to extract legislative intent from this document fails. As the Court concluded in the *Pocket Veto Case*, with the same evidence before it, "[n]o light is thrown on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention. . . ." 279 U.S. at 675.

exercise of the President's veto power. The Court's observation in the *Pocket Veto Case* that allowing the President to return a bill to Congress during an adjournment would "keep[ ] the bill in the meantime in a state of suspended animation until the House resumes its sittings . . . necessarily causing delay in [the bill's] reconsideration," 279 U.S. at 684, was unnecessary to the Court's resolution of the case and is not controlling.

As the D.C. Circuit pointed out in *Kennedy v. Sampson*, "The Constitution itself sets no time limit upon Congress' right to override a presidential veto." 511 F.2d at 440 n.27. The Constitution sets a time limit on the President's action, so that he cannot indefinitely impede a law's enactment. No such restraint is necessary on the Congress, whose interest is in attempting to override the President's veto. Accordingly, although the Constitution provides that the originating House "shall enter the [President's] Objections at large on their Journal, and proceed to reconsider [the vetoed bill]," art. I, sec. 7, cl. 2, it does not limit the interval that may elapse between the date of the President's veto and the date of Congress's vote whether to override. For example, the House of Representatives recently considered whether to override President Reagan's veto of a textile-import relief bill more than seven and one-half months after the veto had been exercised.[47] This "delay" is longer than every intersession or intrasession adjournment in the history of the Congress, with the exception of one intersession adjournment in 1869.[48] Unless the Executive takes the position

[47] *See* 132 Cong. Rec. H5506-42 (daily ed. Aug. 6, 1986) (override vote); 131 Cong. Rec. H12830 (daily ed. Dec. 17, 1985) (bill returned). The House had postponed consideration of the President's objections in order to attempt "to work out an accommodation which will avoid unnecessary confrontation." *Ibid.* The House sustained the President's veto by voting to override 276-149. *See* 132 Cong. Rec. H5541-42 (daily ed. Aug. 6, 1986).

[48] Between sessions of the Forty-First Congress, Congress adjourned for almost eight months. *See* Addendum I, p. 68 *infra*.

that, by postponing consideration of the veto, Congress lost the constitutional power to override the President's veto, the Executive must concede that delay is not a relevant constitutional concern.[49]

The irrelevance of the concern over delay is further evident from the fact that the Constitution does not require that the originating House *ever* vote on whether to override a veto. The House may fulfill its constitutional obligation to "proceed to reconsider" a vetoed bill in any number of ways, including "laying it on the table, referring it to a committee, postponing reconsideration to a day certain, or immediately voting on reconsideration."[50] Therefore, under the constitutional scheme established by the Framers, the time lag between a Presidential veto and congressional reconsideration is an irrelevant concern, and the risk of delay before Congress votes on overriding a veto does not affect the President's constitutional ability to return a bill to Congress.[51]

[49] Congress has overridden in its second session bills vetoed during its first session. For example, on January 28, 1976, during the second session of the Ninety-Fourth Congress, Congress overrode the President's veto of H.R. 8069, which the President had vetoed on December 19, 1975, the last day of the Congress's first session. *See* n.31 *supra*. This veto and override are unquestionably valid, yet the petitioners' position would suggest that if the veto had occurred one day later, thereby *decreasing* the interval before Congress's reconsideration, the "delay" would have been unacceptable and would have required use of a pocket veto. Because Congress may during its second session override a veto that the President exercised during its first session, no objection may be raised on grounds of delay to the inherently more timely consideration during Congress's second session of a veto message received during its intersession adjournment.

[50] 7 *Cannon's Precedents of the House of Representatives*, § 1105, at 180-81 (1936); *see id.*, §§ 1100-1114, at 177-86; *see, e.g.*, 132 Cong. Rec. H2 (daily ed. Jan. 21, 1986) (referring to committee); *id.*, H3-4 (debating whether to vote immediately, to postpone consideration until specified date, or to refer to committee); 128 Cong. Rec. S13622 (daily ed. Nov. 30, 1982) (indefinitely postponing consideration).

[51] It is ironic that, in the professed interest of promptness, petitioners maintain that the President was free to deprive Congress of the

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Even if the interval between the President's exercise of a veto and Congress's reconsideration were a valid constitutional concern, changes in Congress's schedule since the time of the *Pocket Veto Case* have substantially alleviated the source of the Court's concern over potential delay. The adjournment at issue in the *Pocket Veto Case* lasted five months. 279 U.S. at 672. "At the time of that decision, intersession adjournments of five or six months were still common." *Sampson,* 511 F.2d at 441; *see id.* at 441 n.30. In contrast, contemporary adjournments are far shorter than they were in the years preceding *Pocket Veto,* and because "matters of legislative concern [are] constantly proliferating," in the modern era "Congress [is] almost constantly in session." *Gravel v. United States,* 408 U.S. 606, 616 (1972).[52] In the past twenty-five years,

opportunity to override his veto, thereby encouraging Congress to withhold the presentation of enacted bills or requiring it to begin the legislative process anew, either of which would generate considerably more delay.

[52] *Accord* Mansfield, *The Dispersion of Authority in Congress,* 32 Proc. Acad. Pol. Sci. 1, 6 (1975) ("[A]part from [these] short recesses . . . Congress has been in virtually continuous session since January 1939. . . ."). The modern abbreviation of intersession adjournments is largely the result of the enactment of the Twentieth Amendment in 1933, four years after the *Pocket Veto Case.* Prior to then, each Congress lasted from March 4 of the odd-numbered year to March 3 of the next odd-numbered year, but, pursuant to art. I, § 4, cl. 2, each session began in December. The intersession adjournment typically lasted from spring or summer, when the first session adjourned, until December, when the second session convened. *See* Pet. App. 33a n.26. Since the Twentieth Amendment, each session begins eleven months earlier—in January—and tends to adjourn in the autumn, creating a much shorter intersession adjournment.

Moreover, the modern Congress continues to function during its adjournments. The Houses continue to exchange messages and have bills enrolled, signed, and presented to the President. *See* H.R. Doc. No. 277, *supra* n.30, § 560, at 270; *id.,* §§ 574–577, at 275–77); *see, e.g.,* 131 Cong. Rec. S363 (daily ed. Part II, Jan. 3, 1985); 129 Cong. Rec. S17192–93 (daily ed. Nov. 18, 1983); 127 Cong. Rec. 32115 (1981). Further, congressional committees, "which, in the legislative scheme of things, [are] for all practical purposes Congress itself," *Doe v. McMillan,* 412 U.S. 306,

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the adjournment between Congress's two sessions has averaged thirty-nine days in length.[53] Although, at nine weeks, the adjournment during which the President attempted to pocket veto H.R. 4042 was "somewhat longer than the average," it was "still considerably shorter than the half-year-long adjournments common at the time of the *Pocket Veto Case.*"[54] Thus, as the court of appeals concluded, contemporary intersession adjournments "do not differ in any practical respect from the intrasession adjournments at issue in *Wright* and *Kennedy v. Sampson.*" Pet. App. 33a.[55]

344 (1973) (Rehnquist, J., concurring and dissenting), continue to conduct business. *See* S. Doc. No. 13, *supra* n.30, at 31; H.R. Doc. No. 277, *supra* n.30, § 589, at 282. Similarly, "[t]he business of conferences between the two Houses is not interrupted by an adjournment of a session which does not terminate the Congress. . . ." *Id.,* § 901, at 631.

[53] *See* Addendum I, p. 69 *infra.* The Congress has adjourned for five months or more only twice in the past fifty years, in 1953 and 1955. *Ibid.*

[54] Pet. App. 33a. At sixty-five days, the adjournment between sessions of the Ninety-Eighth Congress was the longest adjournment in the past twenty years. *See* Addendum I, p. 69 *infra.*

[55] *Sampson* involved a five-day intrasession adjournment of Congress. After examining Congress's historical adjournment pattern, the court concluded that "intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case.*" 511 F.2d at 441; *see id.* at 442–45 (Appendix). Accordingly, the court concluded that no "intrasession adjournment, as that practice is presently understood, can prevent the return of a bill by the President where appropriate arrangements have been made for receipt of presidential messages during the adjournment." *Id.* at 442. Examination of Congress's pattern of intrasession and intersession adjournments since the *Sampson* case reveals that the factual predicate for the court's conclusion remains equally valid today for adjournments of both types. *See* Addendum I, p. 69 *infra;* Addendum II, pp. 71–72 *infra.* The court of appeals correctly held that "the distinction between modern intrasession and intersession adjournments" is not "worthy of constitutional significance." Pet. App. 45a.

3. The House Had Arranged for Its Clerk to Receive Veto Messages During the Intersession Adjournment

At the conclusion of the first session of the Ninety-Eighth Congress, both Houses of Congress had made "appropriate arrangements . . . for the receipt of presidential messages during the adjournment." *Sampson,* 511 F.2d at 437. The House of Representatives, which originated H.R. 4042, provides by rule for the receipt of Presidential veto messages during all recesses and adjournments: "The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session." [56] Both Houses' practice in recent years of explicitly conferring authority upon their officers to receive Presidential messages during adjournments contrasts sharply with the situation prevailing in 1929, when the Court observed that both Houses of Congress had a "long established practice" of receiving messages from the President only while they were in session. *The Pocket Veto Case,* 279 U.S. at 683.[57] Thus, unlike the situation prevailing in 1929, the contemporary designation of congressional agents to receive veto messages ensured that the President was not prevented from returning H.R. 4042 to the House of Representatives with his objections.

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[56] J.A 34 (Rule III.5). Because House Rule III applies "at any time that the House is not in session," it provides the Clerk with identical authority to accept veto messages during overnight or other brief breaks and during longer adjournments. Because H.R. 4042 originated in the House, only the House's arrangement to receive Presidential messages when not in session is directly relevant to this case. However, the Senate also had authorized receipt of messages from the President by an officer, its Secretary, during the intersession adjournment. 129 Cong. Rec. S17192-93 (daily ed. Nov. 18, 1983).

[57] Moreover, Congress's explicit designation of agents to receive veto messages is certainly less open to question than is the practice, which the Court approved in *Wright,* of acceptance of a veto message "to protect the interests of the Senate, so that it might have the opportunity to reconsider the bills" (302 U.S. at 585 n.1), by an officer of the Senate upon whom, at the time of *Wright,* no "such authority ha[d] ever been conferred," *id.* at 599 (opinion of Stone, J.).

C. Recent Presidential and Congressional Practice Demonstrates that the President Could Have Returned H.R. 4042 to Congress

The President could have properly effected a pocket veto of H.R. 4042 only if he had been *prevented* from returning the bill to the House of Representatives with his objections. As then-Assistant Attorney General Rehnquist observed, the President never has a choice as to whether to return a bill to Congress or to use a pocket veto: to preclude a bill from becoming law, the President must return it to the originating House of Congress, unless Congress's adjournment prevents him from doing so.[58] Recent congressional and Presidential practice, including successful return vetoes during precisely the circumstances involved here, undermines any claim that return of bills during intersession adjournments is impossible. This recent practice conclusively establishes that President Reagan's decision to use a pocket veto to foreclose congressional reconsideration of H.R. 4042 was not necessitated by prevention of a return veto, but was instead a choice that he could not make.

1. Recent Presidents Have Returned Bills to Congress By Delivery to Congressional Agents

All Presidents since the D.C. Circuit's decision in *Kennedy v. Sampson* have returned bills to Congress with their objections during various types of congressional ad-

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[58]

> I do not think that . . . the Constitution . . . contemplates giving [the President] an option saying you can either pocket veto in a situation or you can send it back with a veto message. . . . [T]he President, based on whatever advice he can get, has to determine, "Is this a pocket veto situation or is it a regular veto situation?" and it is either one or the other. . . . [H]e does not have a choice in a sense of saying, "Would I rather pocket veto or would I rather give it a regular veto?" It is either a situation for one or for the other, in my opinion.

Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 14, 15–16 (1971); *accord id.* at 19.

journments. Attorney General Levi's announcement of President Ford's policy acknowledged that neither intrasession nor intersession adjournments prevent use of a return veto:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.[59]

Subsequent Presidential practices demonstrate the correctness of this view. Twice President Ford successfully exercised return vetoes by returning bills to Congress during intersession adjournments.[60] President Carter similarly returned S. 2096, 96th Congress, to the Senate after it had adjourned its first session by delivering the

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[59] 122 Cong. Rec. 11202 (1976). President Ford's agreement followed the entry of a consent judgment in *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976), extending the holding of *Kennedy v. Sampson* to an intersession veto. The judgment declared that a bill purportedly pocket vetoed during the intersession adjournment of the Ninety-Third Congress had become law. This judgment, which the Executive agreed to, and the ruling in *Kennedy v. Sampson*, which the Executive did not appeal, constitute strong evidence that the Executive understands that return to an agent is possible during both intersession and intrasession adjournments.

[60] During the thirty-day intersession adjournment of the Ninety-Fourth Congress, President Ford vetoed S. 2350 and H.R. 5900, which had been passed during the first session. *House Calendar*, 94th Cong. 130–31 (final ed. 1977). The vetoed bills were accepted by the appointed officers of the respective Houses and noted in the respective journals, and upon the convening of Congress's second session, the messages were laid before the Houses. Senate Journal, 94th Cong., 1st Sess. 1431 (1975); House Journal, 94th Cong., 1st Sess. 2246–47 (1975); 122 Cong. Rec. 2, 145 (1976). Both vetoes were sustained. *House Calendar*, 94th Cong. 130–31 (final ed. 1977).

vetoed bill to the Secretary of the Senate.[61] President Reagan's veto practices similarly reveal that there is no longer any difficulty in returning a veto when the originating House is not in session. In fact, during President Reagan's tenure, formal return of bills in the presence of the sitting House has been the exception, not the rule. Of the twenty-six bills that President Reagan has return vetoed, only six were returned to the originating House while it was in session.[62] The other twenty veto messages were returned to an official of the originating House, because the House was not in session when the President vetoed the bill. Ten of these veto messages were delivered to the designated official while the Congress was in intrasession adjournments of between five and fifty-eight days' duration.[63] Petitioners' position would render ineffective the return for congressional reconsideration of all ten of these bills.[64]

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[61] 126 Cong. Rec. 6–7 (1980). In contrast to President Ford's vetoes, which occurred while the Congress was in intersession adjournment, when President Carter vetoed S. 2096, only the Senate had adjourned; the House of Representatives took no intersession adjournment during the Ninety-Sixth Congress. Petitioners' position would nevertheless challenge the efficacy of President Carter's return veto, because the Senate had adjourned for more than three days.

[62] *See* Addendum III, pp. 73–76 *infra*. President Reagan has also pocket vetoed twenty-one bills: two intersession vetoes (including H.R. 4042) and nineteen uncontested pocket vetoes after the final adjournments of the Ninety-Seventh and Ninety-Eighth Congresses. *See* Addendum III, pp. 73–75 *infra*.

[63] *See* Addendum III, pp. 73–74, 76 *infra*.

[64] Two of these intrasession return vetoes were overridden by Congress, and the Executive Branch has published those bills as laws. Pub. L. No. 97-215, 96 Stat. 178 (1982) (H.R. 6198); Pub. L. No. 97-257, 96 Stat. 818 (1982) (H.R. 6863). Under petitioners' interpretation these bills were properly subject to a pocket veto, not a return veto. If petitioners are correct, the bills were not subject to congressional reconsideration and override and, hence, they are not laws.

In addition to these intrasession return vetoes, President Reagan returned two bills to Congress during the intersession adjournment of the current Congress, noting the court of appeals' decision in this case,

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Whether the Houses of Congress were adjourned overnight or for two months, the mechanics of Presidential vetoes were executed with routine precision. In each instance, on the first day the originating House was in session, the agent formally transmitted the sealed envelope, which the President had stated contained the vetoed bill together with his objections, to the presiding officer. The date and time of receipt were noted both in the letter of transmittal and in the Congressional Record. The presiding officer announced in the chamber the receipt of the veto message in order for it to be read and to be spread upon the journal.

2. This Recent Understanding, Rather Than Previous Historical Practices, Illuminates the Current Scope of the Pocket Veto Provision

Of course, Presidential and congressional practice cannot alter the meaning, or waive the applicability, of the Constitution. *See Chadha,* 462 U.S. at 942 n.13. The question posed by the pocket veto clause, however, is whether Congress has "prevented" the President from returning a bill during a particular adjournment. Where practices and circumstances have changed the answer to that question, the clause contains the flexibility to reflect that change, because "[t]he text does not say, or necessarily imply, that adjournment will always 'prevent' return; it provides only for the case where it does." Black, *supra* p. 41, at 101. Thus, the language of the pocket veto clause itself demonstrates that the clause is not one of those constitutional provisions whose application is fixed by a contemporaneous interpretation by the First Congress. *Marsh v. Chambers,* 463 U.S. 783, 790 (1983); *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 411–12

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but recording his view that he was entitled to pocket veto these bills. 132 Cong. Rec. H2 (daily ed. Jan. 21, 1986) (H.R. 1404 and H.R. 3384). No difficulties were raised by these returns. President Reagan's eight remaining vetoes were returned to congressional agents while the originating House was adjourned for the weekend or overnight. *See* Addendum III, pp. 73–75 *infra.*

(1928).[65] Instead of adopting a fixed definitional approach, the Framers established a conditional rule to guarantee both that the Congress could not deprive the President of his qualified veto and that the President in turn could not deprive the Congress of its right to reconsider vetoed bills. Knowing that they could not accurately predict details of the organizational practices of the government, the Framers left it to events to determine when the condition obtained.[66]

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[65] Petitioners erroneously believe (Pet. Br. 45–47) that the scope of the pocket veto power is controlled by the Court's notation in the *Pocket Veto Case* of "the practical construction that has been given to it by Presidents through a long course of years, in which Congress has acquiesced." 279 U.S. at 688–89. Petitioners' continued reliance on that construction is unconvincing, because, as the court of appeals pointed out, "it developed under adjournment conditions markedly different from those prevailing today." Pet. App. 42a. In recent years the Executive and the Legislative Branches have reached a different understanding that recognizes the ability of congressional agents to accept veto messages during adjournments. It is this construction, which reflects modern realities, that " 'is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.' " *The Pocket Veto Case,* 279 U.S. at 690 (quoting *State v. South Norwalk,* 77 Conn. 257, 264 (1904)).

[66] Over time, the understanding of other procedural requirements of art. I, sec. 7 has evolved to conform to modern realities and to further the purposes of the provisions. No pocket veto was exercised during the first eleven Congresses. President Madison became the first President to use a pocket veto twenty-three years after the Constitution was ratified by his pocket veto of a bill that had "been presented at an hour too near the end of the session to be returned with objections." 25 Annals of Cong. 17 (1812), *reprinted in Constitutionality of the President's "Pocket Veto" Power: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess.* 132 (1971). In that era Presidential signing practices were far different from today. Presidents signed bills at the Capitol in the belief that they were not empowered to approve bills after Congress had adjourned. Therefore, President Madison had only two days to approve the bill that he pocket vetoed. Since then, the Court has established that the President has the full ten days to decide whether to sign bills, regardless of Congress's schedule. *See Edwards v. United States,* 286

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As the development of cases concerning the pocket veto demonstrates, a return veto that may have been "impossible" (*The Pocket Veto Case,* 279 U.S. at 681) in 1929 need not be impossible for all time.[67] The modern experience of Presidential and congressional actions demonstrates forcefully that it is now far from "impossible" for the President to return a bill to Congress during an intersession adjournment. Thus, "the determinative question . . . whether . . . an interim adjournment, such as an adjournment of the first session, . . . is one that 'prevents' the President from returning the bill," *id.* at 680, today must be answered negatively.

This Court should reaffirm the principle, which guided its holdings in *Pocket Veto* and *Wright,* that the President

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U.S. 482 (1932); *La Abra Silver Mining Co. v. United States,* 175 U.S. 423 (1899). Therefore, pressure can no longer be put on the President for unduly hasty consideration.

Later, initiation of the era of overseas Presidential travel generated the issue of whether delivery of an enrolled bill to the White House constituted presentment, even if the President was out of the country. Observing that " 'the Constitution is not a code of administrative procedure, but a frame of government,' " *Eber Bros. Wine & Liquor Corp. v. United States,* 337 F.2d 624, 629 (Ct. Cl. 1964) (quoting *United States v. Weil,* 29 Ct. Cl. 523, 546 (1894)), *cert. denied,* 380 U.S. 950 (1965), the court permitted delivery to the President's agent, interpreting the presentation directive to give "full play to the overall constitutional mechanism of checks and balance" and rejecting reliance upon past practices and assumptions of both the President and the Congress, *id.* at 630, 631-33.

[67] The return veto of a bill during the Senate's intersession adjournment in 1980 demonstrates vividly the extent to which circumstances have changed since 1929. *See* pp. 60–61 & n.61 *supra.* This veto shares several formal attributes with the veto at issue in the *Pocket Veto Case.* In both cases, one House had adjourned *sine die,* while the other House was in an intrasession adjournment before resuming to address remaining business; neither House was in session on the day of return. In the *Pocket Veto Case,* the Court found this to be "in effect" an adjournment of the first session of Congress, and return was prevented. 279 U.S. at 672 n.1. In 1980 return was not prevented, because Congress had appointed agents to accept veto messages, and Presidential practice and judicial judgments had demonstrated that such appointment made return possible.

may use the pocket veto authority only for the purpose for which the Framers provided him with it: to ensure that Congress does not deprive him of the ability to veto a bill. The Court should reject the Executive Branch's contrary view that the President may choose to use the pocket veto, notwithstanding his ability to return a bill to Congress with his objections, in order to preclude Congress from overriding his veto. The principle of separated and mutually checking powers does not tolerate this diminution of the Congress's prerogative to enact legislation over the President's objections.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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ADDENDUM I: INTERSESSION ADJOURNMENTS OF CONGRESS, 1789–1986

Congress/ Session [1]	Dates of adjournment [2]	Length of adjournment [3]	Number of pocket vetoes
1/1	Sept. 30, 1789–Jan. 4, 1790	3 mos	0
1/2	Aug. 13–Dec. 6, 1790	3¾ mos	0
2/1	May 9–Nov. 5, 1792	5¾ mos	0
3/1	June 10–Nov. 3, 1794	4¾ mos	0
4/1	June 2–Dec. 5, 1796	6 mos	0
5/1	July 11–Nov. 13, 1797	4 mos	0
5/2	July 17–Dec. 3, 1798	4½ mos	0
6/1	May 15–Nov. 17, 1800	6 mos	0
7/1	May 4–Dec. 6, 1802	7 mos	0
8/1	Mar. 28–Nov. 5, 1804	7¼ mos	0
9/1	Apr. 22–Dec. 1, 1806	7¼ mos	0
10/1	Apr. 26–Nov. 7, 1808	6½ mos	0
11/1	June 29–Nov. 27, 1809	5 mos	0
11/2	May 2–Dec. 3, 1810	7 mos	0
12/1	July 7–Nov. 2, 1812	3¾ mos	1
13/1	Aug. 3–Dec. 6, 1813	4 mos	0
13/2	Apr. 19–Sept. 19, 1814	5 mos	0
14/1	May 1–Dec. 2, 1816	7 mos	1
15/1	Apr. 21–Nov. 16, 1818	6¾ mos	0
16/1	May 16–Nov. 13, 1820	6 mos	0
17/1	May 9–Dec. 2, 1822	6¾ mos	0
18/1	May 28–Dec. 6, 1824	6¼ mos	0
19/1	May 23–Dec. 4, 1826	6¼ mos	0
20/1	May 27–Dec. 1, 1828	6¼ mos	0
21/1	June 1–Dec. 6, 1830	6¼ mos	2
22/1	July 17–Dec. 3, 1832	4½ mos	2
23/1	July 1–Dec. 1, 1834	5 mos	1
24/1	July 5–Dec. 5, 1836	5 mos	0
25/1	Oct. 17–Dec. 4, 1837	48 days	0
25/2	July 10–Dec. 3, 1838	4¾ mos	0
26/1	July 22–Dec. 7, 1840	4½ mos	0
27/1	Sept. 14–Dec. 6, 1841	2¾ mos	0
27/2	Sept. 1–Dec. 5, 1842	3¼ mos	2
28/1	June 18–Dec. 2, 1844	5½ mos	0
29/1	Aug. 11–Dec. 7, 1846	3¾ mos	0
30/1	Aug. 15–Dec. 4, 1848	3½ mos	0
31/1	Oct. 1–Dec. 2, 1850	62 days	0
32/1	Sept. 1–Dec. 6, 1852	3¼ mos	0
33/1	Aug. 8–Dec. 4, 1854	3¾ mos	0
34/1	Aug. 19–Aug. 21, 1856	2 days	0
34/2	Aug. 31–Dec. 1, 1856	3 mos	0
35/1	June 15–Dec. 6, 1858	5¾ mos	1
36/1	June 26–Dec. 3, 1860	5¼ mos	0
37/1	Aug. 7–Dec. 2, 1861	3¾ mos	0
37/2	July 18–Dec. 1, 1862	4½ mos	0
38/1	July 5–Dec. 5, 1864	5 mos	2
39/1	July 29–Dec. 3, 1866	4¼ mos	2

ADDENDUM I: INTERSESSION ADJOURNMENTS OF CONGRESS, 1789–1986—Continued

Congress/ Session [1]	Dates of adjournment [2]	Length of adjournment [3]	Number of pocket vetoes
40/1	Dec. 2–Dec. 2, 1867	0 days	0
40/2	Nov. 11–Dec. 7, 1868	26 days	0
41/1	Apr. 11–Dec. 6, 1869	7¾ mos	1
41/2	July 16–Dec. 5, 1870	4½ mos	0
42/1	Apr. 21–Dec. 4, 1871	7½ mos	1
42/2	June 11–Dec. 2, 1872	5¾ mos	2
43/1	June 24–Dec. 7, 1874	5½ mos	2
44/1	Aug. 16–Dec. 4, 1876	3½ mos	1
45/1	Dec. 3–Dec. 3, 1877	0 days	0
45/2	June 21–Dec. 2, 1878	5¼ mos	0
46/1	July 2–Dec. 1, 1879	5 mos	0
46/2	June 17–Dec. 6, 1880	5½ mos	0
47/1	Aug. 9–Dec. 4, 1882	3¾ mos	0
48/1	July 8–Dec. 1, 1884	4¾ mos	6
49/1	Aug. 6–Dec. 6, 1886	4 mos	10
50/1	Oct. 21–Dec. 3, 1888	43 days	22
51/1	Oct. 2–Dec. 1, 1890	2 mos	11
52/1	Aug. 6–Dec. 5, 1892	4 mos	1
53/1	Nov. 4–Dec. 4, 1893	30 days	0
53/2	Aug. 29–Dec. 3, 1894	3¼ mos	6
54/1	June 12–Dec. 7, 1896	5¾ mos	16
55/1	July 25–Dec. 6, 1897	4¼ mos	0
55/2	July 9–Dec. 5, 1898	4¾ mos	1
56/1	June 8–Dec. 3, 1900	5¾ mos	2
57/1	July 2–Dec. 1, 1902	5 mos	0
58/1	Dec. 7–Dec. 7, 1903	0 days	0
58/2	Apr. 29–Dec. 5, 1904	6¼ mos	0
59/1	July 1–Dec. 3, 1906	5 mos	9
60/1	May 31–Dec. 7, 1908	7¼ mos	0
61/1	Aug. 6–Dec. 6, 1909	4 mos	0
61/2	June 26–Dec. 5, 1910	5¼ mos	3
62/1	Aug. 23–Dec. 4, 1911	3½ mos	0
62/2	Aug. 27–Dec. 2, 1912	3¼ mos	2
63/1	Dec. 1–Dec. 1, 1913	0 days	0
63/2	Oct. 25–Dec. 7, 1914	43 days	0
64/1	Sept. 9–Dec. 4, 1916	2¾ mos	1
65/1	Oct. 7–Dec. 3, 1917	57 days	1
65/2	Nov. 22–Dec. 2, 1918	10 days	0
66/1	Nov. 20–Dec. 1, 1919	11 days	0
66/2	June 6–Dec. 6, 1920	6 mos.	3
67/1	Nov. 24–Dec. 5, 1921	11 days	0
67/2	Sept. 23–Nov. 20, 1922	58 days	1
67/3	Dec. 4–Dec. 4, 1922	0 days	0
68/1	June 8–Dec. 1, 1924	5¾ mos	0
69/1	July 4–Dec. 6, 1926	5 mos	5
70/1	May 30–Dec. 3, 1928	6 mos	3
71/1	Nov. 23–Dec. 2, 1929	9 days	0
71/2	July 4–Dec. 1, 1930	5 mos	3

ADDENDUM I: INTERSESSION ADJOURNMENTS OF CONGRESS, 1789–1986—Continued

Congress/ Session [1]	Dates of adjournment [2]	Length of adjournment [3]	Number of pocket vetoes
72/1	July 17–Dec. 5, 1932	4½ mos	1
73/1	June 16, 1933–Jan. 3, 1934	6½ mos	1
74/1	Aug. 27, 1935–Jan. 3, 1936	4¼ mos	28
75/1	Aug. 22–Nov. 15, 1937	2¾ mos	23
75/2	Dec. 22, 1937–Jan. 3, 1938	12 days	0
76/1	Aug. 6–Sept. 21, 1939	46 days	40
76/2	Nov. 4, 1939–Jan. 3, 1940	60 days	0
77/1	Jan. 3–Jan. 5, 1942	2 days	0
78/1	Dec. 22, 1943–Jan. 10, 1944	19 days	3
79/1	Dec. 22, 1945–Jan. 14, 1946	23 days	4
80/1	Dec. 20, 1947–Jan. 6, 1948	17 days	0
81/1	Oct. 20, 1949–Jan. 3, 1950	75 days	2
82/1	Oct. 21, 1951–Jan. 8, 1952	79 days	4
83/1	Aug. 4, 1953–Jan. 6, 1954	5 mos	6
84/1	Aug. 3, 1955–Jan. 3, 1956	5 mos	8
85/1	Aug. 31, 1957–Jan. 7, 1958	4¼ mos	9
86/1	Sept. 16, 1959–Jan. 6, 1960	3½ mos	10
87/1	Sept. 28, 1961–Jan. 10, 1962	3¼ mos	2
88/1	Dec. 31, 1963–Jan. 7, 1964	7 days	2
89/1	Oct. 24, 1965–Jan. 10, 1966	2½ mos	0
90/1	Dec. 16, 1967–Jan. 15, 1968	30 days	1
91/1	Dec. 24, 1969–Jan. 19, 1970	26 days	0
92/1	Dec. 18, 1971–Jan. 18, 1972	31 days	1
93/1	Dec. 23, 1973–Jan. 21, 1974	29 days	1 [4]
94/1	Dec. 20, 1975–Jan. 19, 1976	30 days	0
95/1	Dec. 16, 1977–Jan. 19, 1978	34 days	0
96/1	Jan. 3, 1980–Jan. 3, 1980	0 days	0
97/1	Dec. 17, 1981–Jan. 25, 1982	39 days	1
98/1	Nov. 19, 1983–Jan. 23, 1984	65 days	1 [5]
99/1	Dec. 21, 1985–Jan. 21, 1986	31 days	0

[1] Congress and session numbers represent the session preceding the adjournment. Sources: U.S. Congress, *1985–1986 Congressional Directory* 420–25 (1985); 131–32 Cong. Rec. (1985–86).

[2] The date of the beginning of each adjournment is the first day on which neither House of Congress was in session, unless Congress adjourned and reconvened the same day. The date of the end of each adjournment is the day on which one or both Houses reconvened.

[3] The length of adjournment is the number of days on which neither House of Congress was in session. The length represents the number of days from the day after the last House adjourned through the day before either House reconvened. These intervals have been rounded to the nearest one-quarter month. Adjournments of less than 2½ months have been expressed exactly in days.

[4] *See Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976).

[5] H.R. 4042, 98th Congress.

ADDENDUM II: INTRASESSION ADJOURNMENTS OF CONGRESS,[1] 1974–SEPTEMBER 1986 [2]

Congress/ Session	Dates of adjournment [3]	Length of adjournment [4]	Number of pocket vetoes
93/2	Aug. 23–Sept. 4, 1974	12 days	0
	Oct. 18–Nov. 18 1974	31 days	
	Nov. 27–Dec. 2, 1974	5 days	
94/1	Mar. 27–Apr. 7, 1975	11 days	0
	May 23–June 2, 1975	10 days	
	June 28–July 7, 1975	9 days	
	Aug. 2–Sept. 3, 1975	32 days	
	Oct. 10–Oct. 20, 1975	10 days	
	Oct. 24–Oct. 28, 1975	4 days	
	Nov. 21–Dec. 1, 1975	10 days	
94/2	Feb. 12–Feb. 16, 1976	4 days	0
	Apr. 15–Apr. 26, 1976	11 days	
	May 29–June 1, 1976	3 days	
	July 3–July 19, 1976	16 days	
	Aug. 11–Aug. 23, 1976	12 days	
	Sept. 3–Sept. 7, 1976	4 days	
95/1	Feb. 12–Feb. 16, 1977	4 days	0
	Apr. 8–Apr. 18, 1977	10 days	
	May 28–June 1, 1977	4 days	
	July 2–July 11, 1977	9 days	
	Aug. 7–Sept. 7, 1977	31 days	
95/2	Feb. 11–Feb. 14, 1978	3 days	0
	Mar. 24–Apr. 3, 1978	10 days	
	May 27–May 31, 1978	4 days	
	June 30–July 10, 1978	10 days	
	Aug. 26–Sept. 6, 1978	11 days	
96/1	Feb. 10–Feb. 13, 1979	3 days	0
	Apr. 11–Apr. 23, 1979	12 days	
	May 25–May 30, 1979	5 days	
	June 30–July 9, 1979	9 days	
	Aug. 4–Sept. 5, 1979	32 days	
	Nov. 21–Nov. 26, 1979	5 days	
96/2	Apr. 4–Apr. 15, 1980	11 days	0
	May 23–May 28, 1980	5 days	
	July 3–July 21, 1980	18 days	
	Aug. 7–Aug. 18, 1980	11 days	
	Aug. 29–Sept. 3, 1980	5 days	
	Oct. 3–Nov. 12, 1980	40 days	
	Nov. 26–Dec. 1, 1980	5 days	
97/1	Feb. 7–Feb. 16, 1981	9 days	0
	Apr. 11–Apr. 27, 1981	16 days	
	June 27–July 8, 1981	11 days	
	Aug. 5–Sept. 9, 1981	35 days	
	Oct. 8–Oct. 13, 1981	5 days	
	Nov. 25–Nov. 30, 1981	5 days	
97/2	Feb. 12–Feb. 22, 1982	10 days	0
	Apr. 7–Apr. 13, 1982	6 days	

ADDENDUM II: INTRASESSION ADJOURNMENTS OF CONGRESS,[1] 1974–SEPTEMBER 1986 [2]—Continued

Congress/ Session	Dates of adjournment [3]	Length of adjournment [4]	Number of pocket vetoes
	May 28–June 2, 1982	5 days	
	July 2–July 12, 1982	10 days	
	Aug. 21–Sept. 8, 1982	18 days	
	Oct. 2–Nov. 29, 1982	58 days	
98/1	Jan. 7–Jan. 25, 1983	18 days	0
	Mar. 25–Apr. 5, 1983	11 days	
	May 27–June 1, 1983	5 days	
	July 1–July 11, 1983	10 days	
	Aug. 5–Sept. 12, 1983	38 days	
	Oct. 8–Oct. 17, 1983	9 days	
98/2	Feb. 10–Feb. 20, 1984	10 days	0
	Apr. 13–Apr. 24, 1984	11 days	
	May 25–May 30, 1984	5 days	
	June 30–July 23, 1984	23 days	
	Aug. 11–Sept. 5, 1984	25 days	
99/1	Feb. 8–Feb. 18, 1985	10 days	0
	Apr. 5–Apr. 15, 1985	10 days	
	May 25–June 3, 1985	9 days	
	June 28–July 8, 1985	10 days	
	Aug. 2–Sept. 4, 1985	33 days	
	Nov. 24–Dec. 2, 1985	8 days	
99/2	Feb. 8–Feb. 17, 1986	9 days	0
	Mar. 28–Apr. 8, 1986	11 days	
	May 23–June 2, 1986	10 days	
	June 27–July 14, 1986	17 days	
	August 17–Sept. 8, 1986	22 days	

[1] This table includes intrasession adjournments taken pursuant to concurrent action of the Houses of Congress. *See* U.S. Const., art. I, § 5, cl. 4.

[2] This table brings up to date the D.C. Circuit's Appendix in *Kennedy v. Sampson*, 511 F.2d 430, 442–45 (D.C. Cir. 1974). Sources: U.S. Congress, *1985–1986 Congressional Directory* 425–27 (1985); Senate Library, U.S. Senate, *Presidential Vetoes, 1789–1976 (1978)*; Senate Library, U.S. Senate, *Presidential Vetoes, 1977–1984* (1985); 130–32 Cong. Rec. (1984–86).

[3] The date of the beginning of each adjournment is the first day on which neither House was in session; the date of the end of each adjournment is the day on which one or both Houses resumed the session. This method, taken from *Sampson*, may understate the relevant length of intrasession adjournments somewhat, because an issue may arise whether a pocket veto or return veto should be used during a portion of any intrasession adjournment when only one House is adjourned. This table does not include such periods.

[4] The length of adjournment is the number of days on which neither House of Congress was in session. The length represents the number of days from the day after the last House adjourned through the day before either House reconvened. The length may be three or fewer days when the Houses adjourned by concurrent resolution but staggered their break to provide only a short overlap.

ADDENDUM III: PRESIDENTIAL VETOES, 1981–AUGUST 1986[1]

Bill	Type of veto	Type and length of adjournment	Date of veto	Cite
		97th Congress, 1st Session		
H.J. Res. 357	Return veto	Congress in session	11/23/81	127 Cong. Rec. 28874, 28880–81 (11/23/81).
H.R. 4353	Pocket veto	Intersession adjournment (39 days).	12/29/81	Senate Journal 701 (Dec. 16, 1981).
		97th Congress, 2d Session		
S. 1503	Return veto	Senate in recess for weekend	3/20/82	128 Cong. Rec. 4843, 4893–94 (3/22/82).
H.R. 5118	Return veto	Intrasession adjournment (5 days).	6/1/82	128 Cong. Rec. 12736 (daily ed. 6/2/82).
H.R. 5922	Return veto	Congress in session	6/24/82	128 Cong. Rec. H3919 (daily ed. 6/24/82).
H.R. 6682	Return veto	House adjourned for weekend	6/25/82	128 Cong. Rec. H3972 (daily ed. 6/28/82).
H.R. 6198	Return veto (overridden)	Intrasession adjournment (10 days).	7/8/82	128 Cong. Rec. H3984 (daily ed. 7/12/82).
H.R. 6863	Return veto (overridden)	Intrasession adjournment (18 days).	8/28/82	128 Cong. Rec. H6743 (daily ed. 9/8/82).
H.R. 1371	Return veto	Intrasession adjournment (58 days).	10/15/82	128 Cong. Rec. H8515 (daily ed. 11/29/82).
S. 2577	Return veto	Intrasession adjournment (58 days).	10/22/82	128 Cong. Rec. S13439, S13445 (daily ed. 11/29/82).
S. 2623	Pocket veto	Final adjournment	1/3/83	House Calendar 9–31 (final ed. 1982).
H.R. 5858	Pocket veto	Final adjournment	1/4/83	House Calendar 9–31 (final ed. 1982).
H.R. 3963	Pocket veto	Final adjournment	1/14/83	House Calendar 9–31 (final ed. 1982).
H.R. 9	Pocket veto	Final adjournment	1/14/83	House Calendar 9–31 (final ed. 1982).
H.R. 7336	Pocket veto	Final adjournment	1/14/83	House Calendar 9–31 (final ed. 1982).

ADDENDUM III: PRESIDENTIAL VETOES, 1981-AUGUST 1986[1]—Continued

Bill	Type of veto	Type and length of adjournment	Date of veto	Cite
		98th Congress, 1st Session		
S. 366	Return veto	Congress in session	4/5/83	129 Cong. Rec. S4154 (daily ed. 4/5/83).
S. 973	Return veto	Senate adjourned for weekend	6/18/83	129 Cong. Rec. S8671 (daily ed. 6/20/83).
H.R. 3564	Return veto	Intrasession adjournment (38 days).	8/12/83	129 Cong. Rec. H6690 (daily ed. 9/12/83).
H.J. Res. 338	Return veto	Intrasession adjournment (38 days).	8/13/83	129 Cong. Rec. H6690 (daily ed. 9/12/83).
S.J. Res. 149	Return veto	Intrasession adjournment (38 days).	8/23/83	129 Cong. Rec. S11982 (daily ed. 9/12/83).
H.R. 1062	Return veto (overridden)	House adjourned for evening	10/19/83	129 Cong. Rec. H8471 (daily ed. 10/20/83).
H.R. 4042	Pocket veto	Intersession adjournment (65 days).	11/30/83	19 Weekly Comp. Pres. Doc. 1627-28 (11/30/83).
		98th Congress, 2d Session		
S. 684	Return veto (overridden)	Congress in session	2/21/84	130 Cong. Rec. S1389 (daily ed. 2/21/84).
S. 2436	Return veto	Intrasession adjournment (25 days).	8/29/84	130 Cong. Rec. S10720 [2] (daily ed. 9/5/84).
H.R. 1362	Return veto	House adjourned for weekend	10/8/84	130 Cong. Rec. H11593 (daily ed. 10/9/84).
S. 1967	Pocket veto	Final adjournment	10/17/84	131 Cong. Rec. S463 (daily ed. 1/22/85).
H.R. 2859	Pocket veto	Final adjournment	10/17/84	130 Cong. Rec. H12291 (daily ed. 11/14/84.
S. 607	Pocket veto	Final adjournment	10/19/84	131 Cong. Rec. S463-64 (daily ed. 1/22/85).
S. 1097	Pocket veto	Final adjournment	10/19/84	131 Cong. Rec. S464 (daily ed. 1/22/85).
S. 2166	Pocket veto	Final adjournment	10/19/84	131 Cong. Rec. S464 (daily ed. 1/22/85).
H.R. 6248	Pocket veto	Final adjournment	10/19/84	130 Cong. Rec. H12291 (daily ed. 11/14/84).
S. 540	Pocket veto	Final adjournment	10/30/84	131 Cong. Rec. S462 (daily ed. 1/22/85).
S. 2574	Pocket veto	Final adjournment	10/30/84	131 Cong. Rec. S463 (daily ed. 1/22/85).
H.R. 452	Pocket veto	Final adjournment	10/30/84	130 Cong. Rec. H12291 (daily ed. 11/14/84).
H.R. 723	Pocket veto	Final adjournment	10/30/84	130 Cong. Rec. H12291 (daily ed. 11/14/84).
H.R. 999	Pocket veto	Final adjournment	10/30/84	130 Cong. Rec. H12291 (daily ed. 11/14/84).
H.R. 5172	Pocket veto	Final adjournment	10/30/84	130 Cong. Rec. H12292 (daily ed. 11/14/84).
H.R. 5760	Pocket veto	Final adjournment	10/30/84	130 Cong. Rec. H12292 (daily ed. 11/14/84).
H.R. 5479	Pocket veto	Final adjournment	11/8/84	130 Cong. Rec. H12292 (daily ed. 11/14/84).
		99th Congress, 1st Session		
H.R. 1096	Return veto	House adjourned for evening	3/6/85	131 Cong. Rec. H1106 (daily ed. 3/7/85).
H.R. 2409	Return veto (overridden)	House adjourned for weekend	11/8/85	131 Cong. Rec. H9974 (daily ed. 11/12/85).
H.R. 3036	Return veto	House adjourned for weekend	11/15/85	131 Cong. Rec. H10254 (daily ed. 11/18/85).
H.R. 1562	Return veto	Congress in session	12/17/85	131 Cong. Rec. H12830 (daily ed. 12/17/85).
H.R. 1404	Return veto	Intersession adjournment (31 days).	1/14/86	132 Cong. Rec. H2 [2] (daily ed. 1/21/86).

ADDENDUM III: PRESIDENTIAL VETOES, 1981-AUGUST 1986[1]—Continued

Bill	Type of veto	Type and length of adjournment	Date of veto	Cite
H.R. 3384	Return veto	Intersession adjournment (31 days).	1/17/86	132 Cong. Rec. H2 [2] (daily ed. 1/21/86).
		99th Congress, 2d Session		
H.R. 2466	Return veto	Intrasession adjournment (9 days).	2/14/86	132 Cong. Rec. H449 (daily ed. 2/18/86).
S.J. Res. 316	Return veto	Congress in session	5/21/86	132 Cong. Rec. S6332 (daily ed. 5/21/86).

[1] This table supplements the information contained in two published compilations of vetoes: Senate Library, U.S. Senate, *Presidential Vetoes, 1789-1976* (1978); Senate Library, U.S. Senate, *Presidential Vetoes, 1977-1984* (1985).

[2] President Reagan returned bill to Congress, but expressed his view that bill was subject to pocket veto.

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